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IN THE

Supreme Court of the United States.

No. 513 OCTOBER TERM, 1905.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, THE OREGON SHORT LINE RAILROAD COMPANY and the EQUITABLE TRUST COMPANY OF NEW YORK, Appellees below and Appellants here,

vs.

NORTHERN SECURITIES COMPANY, Appellant Below and Appellee here.

On Appeal (by Special Certiorari) from the Decree of the Circuit Court of Appeals for the Third Circuit.

BRIEF ON BEHALF OF APPELLANTS.

D. T. WATSON,
Attorney for Appellants.

Smith Bros. Co., Franklin Print. 428 Grant Street, Pittsburg, Pa.

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It is not proposed in this brief to discuss all the questions in this case but to prove:

That the main, controlling question in the present case has been definitely adjudicated against the Securities Company by this court in the Government Case:

That such adjudication is *res adjudicata* in the present case:

That under your decree, appellants are entitled to the 717,320 shares of Northern Pacific stock involved in this case, and the Securities Company cannot distribute the same *pro rata*.

That the Court of Appeals erred:

(1) In holding to the contrary:

(2) In attempting to finally dispose of this case on appeal from an interlocutory decree.

IN THE

Supreme Court of the United States.

No. 512 OCTOBER TERM, 1905.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, THE OREGON SHORT LINE RAILROAD COMPANY, and the EQUITABLE TRUST COMPANY OF NEW YORK, Appellees in the Court of Appeals and Appellants here,

vs.

NORTHERN SECURITIES COMPANY, Appellant in the Court of Appeals and Appellee here.

On Appeal from the Decree of the United States Circuit Court of Appeals for the Third Circuit, by special allowance of a Writ of Certiorari.

Brief on Behalf of Appellants.

By the Bill in Equity filed in the Circuit Court of New Jersey, appellants aver they are entitled, on surrendering to the Northern Securities Company its certificates of its stock for $82,491,871.00 (par) which they still hold and own, and also the whole, or such portion as the court shall decide, of the sum of $8,915,871.00 cash received from the Securities Company, to have surrendered to them by the Northern Securities Company, 717,320 shares of the capitalstock of the Northern Pacific Railroad Company, which stock they assigned to the Northern Securities Company on November 18th, 1901:

That the Northern Securities Company has the identical Northern Pacific stock so assigned, and that these 717,320 shares of its common stock include certain shares of common stock into which (by agreement with appellants) the Securities Company turned the preferred Northern Pacific stock appellants assigned to it:

And appellants seek by said Bill to have the Securities Company enjoined from making a *pro rata* distribution of the said 717,320 shares of the capital stock of the Northern Pacific Railroad Company to and among the stockholders of the Securities Company and to have the Securities return such shares to appellants.

The case turns upon the following question:

> Did the Northern Securities Company lawfully purchase and become the lawful, absolute owner of the stocks in the Northern Pacific and the Great Northern Railroad Companies, (including appellant's,)so that it may now distribute them *pro rata* among its stockholders?

We say it did not, and aver that this is conclusively so settled by the decision of this court in the *Northern Securities Company vs. United States*, 193 U. S. 197, hereinafter called the Government Case.

The Northern Securities Company says it did become such owner and may so distribute such stock, and that the question was not decided against it in the Government Case.

The Court of Appeals held, (admitting the question to be as stated), that this question was not "*involved*" in the Government Case, nor was it there "*decided*" or "considered" even "*incidentally*."

That case in this court was an appeal by the Northern Securities Company and other respondents from the decree of the Circuit Court of the United States sitting at St. Louis, pursuant to a Bill in Equity filed by the United States in the Circuit Court for that circuit against the Northern Securities Company and others, in which the United States alleged that the respondents therein and others to be joined when ascertained, stockholders of the Northern Pacific and Great Northern Railroad Companies, had formed a combination to restrain trade and commerce contrary to the provisions of the Sherman Act, in manner as follows:

(a) Organizing under the laws of New Jersey the Northern Securities Company as a corporation of the State of New Jersey, solely as a holding company for the purpose and as an instrument of the combination:

(b) Assigning to the Securities Company in pursuance of the combination, at a fixed valuation, more than one-half of the capital stock of the Northern Pacific and Great Northern Railroad Companies, two parallel and competing railroads engaged in interstate commerce, and to have the Northern Securities Company issue in exchange for this railroad stock, the stock of the Securities Company at par:

(c) The Securities Company was to hold said stock,—to vote it and thus control the two railroad Companies; collect the dividends from both railroad companies and distribute the same indifferently among the stockholders of the Securities Company and thus eliminate all incentive to competition between the two railroad companies:

(d) The Securities Company was to be solely an instrument to carry out the scheme, and as a fact it was organized solely for that purpose, and in its charter claimed the right to hold and vote the stock in other

corporations. It was to and did acquire said railroad stock, not as a lawful purchaser and absolute owner, but solely as the representative and the instrument of the combination to carry out its unlawful purposes and held the stock as custodian for the individual stockholders of the two constituent railroad companies who so assigned:

(e) Solely in pursuance of the scheme and combination aforesaid, the railroad stocks in said two competing railroad companies were so assigned to the Securities Company, and among other stocks so assigned was the capital stock of the Northern Pacific Railroad Company owned by the appellants.

The Northern Securities Company and the other respondents filed an answer denying the allegations of the bill, and the issues under said bill, and answers were sharply framed, as above stated. Extracts from the bill and answer hereinafter printed will prove this allegation.

The Circuit Court at St. Louis entered a decree in favor of the United States, and from that decree the Northern Securities Company and the other respondents appealed to this court, but the United States did not appeal.

(I) *This court, in the Government Case decided that the Northern Securities Company was not the lawful purchaser or absolute owner of the capital stock of the Northern Pacific Railroad Company assigned to it by appellants, but held it as custodian for the appellants.*

The opinion of this Court in that case was delivered by Mr. Justice Harlan and in it he *inter alia* said as follows: P. 325, 326.

"Summarizing the principal facts, it is indisputable upon this record that under the leadership of the

defendants, Hill and Morgan, the stockholders of the Great Northern and Northern Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound, combined and conceived the scheme of organizing a corporation under the laws of New Jersey which should hold the shares of the stock of the constituent companies, such shareholders in lieu of their shares in those companies to receive upon an agreed basis of value shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed; and under that scheme, such holding corporation has *become the holder—more properly speaking, the custodian*—of more than nine-tenths of the stock of the Northern Pacific and more than three-fourths of the stock of the Great Northern, the stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation."

This court expressly refused to consider what would have been the effect in the Government Case if the Northern Securities Company had been the lawful purchaser and the lawful, unconditioned owner of the railroad stocks, and you there said:

Pp. 334–335

"It is said that whatever may be the power of a State over such subjects, Congress *cannot forbid* single individuals from *disposing* of their stock in a State corporation, even if such corporation is engaged in interstate and inter-national commerce;

"that the holding or *purchase* by a State corporation, or the *purchase* by *individuals*, of the stock

of another corporation, for whatever purpose, are matters in respect of which Congress has no authority under the Constitution;

"that so far as the power of Congress is concerned, citizens of State corporations may dispose of their property and invest their money in any way they choose; and that in regard to all such matters, citizens and State corporations are subject, if to any authority, only to the lawful authority of the State in which such citizens reside, or under whose laws such corporations are organized.

"It is unnecessary in this case to consider such abstract, general questions. The Court need not now concern itself with them. *They are not* here to be examined and determined, and may well be left for consideration in some case necessarily involving their determination.

"In this connection, it is suggested that the contention of the Government is that the administration and *ownership* of stock in a state railroad corporation is itself interstate commerce, if that corporation be engaged in interstate commerce. This suggestion is made in different ways, sometimes in express words, at other times by implication. For instance, it is said that the question here is whether the power of Congress over interstate commerce extends to the regulation of the ownership of the stock in state railroad companies, by reason of their being engaged in such commerce. Again, it is said that the only issue in this case is whether the Northern Securities Company can acquire and hold stock in other state corporations. Still further, it is asked generally, whether the organization or ownership of railroads is not under the control of the States under whose laws they came into existence? Such statements as to the issues in this case are, we think, wholly unwarranted and are very wide of

the mark; it is the setting up of mere men of straw to be easily stricken down. We do not understand that the Government makes any such contentions or takes any such positions as those statements imply. It does not contend that Congress may control the mere acquisition or the mere ownership of stock in a state corporation engaged in interstate commerce. Nor does it contend that Congress can control the organization of state corporations authorized by their charters to engage in interstate and international commerce. But it does contend that Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful and not prohibited by the Constitution. It does contend that no state corporation can stand in the way of the enforcement of the national will, legally expressed. What the Government particularly complains of, indeed, all that it complains of here, is the existence of a combination among the stockholders of competing railroad companies which in violation of the act of Congress restrains interstate and international commerce through the agency of a common corporate trustee designated to act for both companies in repressing free competition between them."

P. 346.

"But to the end that effect be given to the national will lawfully expressed, Congress may prevent that company *in its capacity as a holding corporation and trustee from carrying out the purposes of the combination formed in restraint of inter-state commerce. The Securities Company is itself part of the present combination; its head and front; its trustee.* It would be extraordinary if the court in executing the Act of Congress

could not lay hands upon that company and prevent it from doing that which, if done, will defeat the Act of Congress." * * * *

P. 353–354.

"It was said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies imported simply an investment in the stock of other corporations, *a purchase of that stock*; which investment or purchase, it is contended, was not forbidden by the charter of the company, and could not be made illegal by any Act of Congress, This view is *wholly fallacious and does not comport with the actual transaction. There was no actual investment in any substantial sense by the Northern Securities Company in the stock of the two constituent companies.* If it was in form such a transaction, it was not in fact one of that kind. *However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railroad Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose.* If any one had full knowledge of what was designed to be accomplished, and as to what was actually accomplished by the combination in question, it was the defendant, Morgan, In his testimony he was asked: 'Why put the stocks of both these (constituent companies) into one holding company?" He frankly answered: 'In the first place this holding company was simply a question of *custodian*, because it had no other alliances.'

"That disclosed the actual nature of the transaction which was only to organize the Northern Securities Company as a *holding* company in whose hands, *not as a real purchaser or absolute owner, but simply as custodian*, were to be placed the stocks of the constituent companies,—such *custodian* to represent the combination formed between the shareholders of the constituent companies; the direct and necessary effect of such combination being, as already indicated, to restrain and monopolize inter-state commerce by suppressing or (to use the words of this Court in *United States vs. Joint Traffic Association*) 'Smothering' competition between the lines of two railroad carriers."

This opinion of the Court put the decision of the case flatly on the ground that the Securities Company was *not* the real absolute owner of the railroad stocks, but simply a holding company, the *illegal* custodian for an *illegal* purpose.

The significance of this plain language of the Court is emphasized when you remember that it was a conclusion arrived at after all the questions in the case had been discussed, and after the Court had considered the repeated ingenious methods by which the Northern Securities Company attempted to shield itself by alleging it was the lawful, absolute owner of the railroad stocks.

It alleged—

As we are such *purchaser*, the Sherman Act cannot forbid it, for that is our right under the Federal Constitution.

Again, it said, to deny us the right to buy is to limit the constitutional right of the individual to sell.

Again,—the Securities Company's right to existence and its right to buy and sell railroad stocks is a matter of State regulation with which Congress cannot interfere.

In the above quotation from pages 353-354 is the final deliberate conclusion of this Court, which put your decision squarely on the proposition that the Securities was *not* the lawful purchaser—real owner of said railroad stocks, but merely the agent—the custodian and trustee—itself a part of the combination—and took the stocks to hold the same as custodian, with the power to vote, and thus manage in one interest the two railroads, and by collecting and dividing the dividends among all stockholders of the Securities Co., eliminate all purpose of competition by the stockholders of either railroad company.

Mr. Justice Brewer concurs in the conclusion.

Mr. Justice Brewer concurred in the results reached by the majority of the court, including the finding that the Northern Securities Company was organized and used for an illegal purpose; that it was illegal for it to acquire a control of the stocks of the two competing railroad companies, and that in so doing it violated the Sherman Act. He not only did not express any dissent from those portions of Judge Harlan's opinion we have cited, but, we submit, he shows an agreement with them—and in fact puts his conclusions on the ground that the Securities Company was *not* the real purchaser and absolute owner of the railroad stocks.

He said:

P. 361, 362.

"Further the general language of the Act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen. If applying this thought to the present case, it appeared that Mr. Hill was the owner of a majority of the stock in the Great Northern Railway Company he could not by any act of Congress be deprived of the right of investing his surplus means in the purchase of stock of the Northern Pacific Railway Company, although such purchase might tend to vest in him through that ownership a control over both companies. In other words, the right, which all other citizens had, of purchasing Northern Pacific stock could not be denied to him by Congress because of his ownership of the stock in the Great Northern Company.

"Such was the ruling in *Pearsall vs. Great Northern Railway* (161 U. S. 646), in which this court said (p. 671), in reference to the right of the stockholders of the Great Northern Railway Company to purchase the stock of the Northern Pacific Railway Company: 'Doubtless these stockholders could lawfully acquire by individual purchases a majority, or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such, in common.'

"*But no such investment by a single individual of his means is here presented.* There was a combination by several individuals separately owning stock in two competing railroad companies to place the control of

both in a single corporation. The purpose to combine and by combination destroy competition existed before the organization of the corporation, the Securities Company. That corporation, though nominally having a capital stock of $400,000,000., had no means of its own; $30,000. in cash was put into its treasury, but simply for the expenses of organization. The organizers might just as well have made the nominal stock a thousand millions as well as four hundred, and the corporation would have been no richer or poorer. A corporation, while by fiction of law recognized for some purpose as a person and for the purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person, created and existing only for the convenient transaction of business. *In this case it was a mere instrumentality by which separate railroad properties were combined under one control.* That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. *The transfer of stock to the Securities Company was a mere incident, the manner in which the combination to destroy competition and thus unlawfully restrain trade was carried out.*"

Mr. Justice White dissenting.

Mr. Justice White, for himself and the Chief Justice and Mr. Justice Peckham and Mr. Justice Holmes, *inter alia*, stated as follows:

P. 365.

"Under these circumstances Mr. Morgan and Mr. Hill organized under the laws of New Jersey the Northern Securities Company. The purpose was that the company should become the holder of the stock of the two railroads. This was to be effected by having the Northern Securities Company give its stock in exchange for that of the two railroad companies. * * * Under the arrangement, the Northern Securities Company came to be the registered holder of the majority of the stock in both the railroads.

"The Government, by its bill, *challenges the right of the Northern Securities Company to hold and own the stock in the two railroads.* * * *

P. 366.

"The court below sustained the contentions of the Government. * * * *

"The court recognized, however, the right of the Northern Securities Company to re-transfer the stock in both railroads to the persons from whom it had been acquired. * * * * *

"Two questions arise. Does the Anti-Trust Act, when rightly interpreted, apply to the acquisition and ownership by the Northern Securities Company of the stock in the two railroads, and, second, if it does, had Congress the power to regulate or control such acquisition and ownership? As the question of power lies at the root of the case, I come at once to consider that subject. Before doing so, however, in order to avoid being misled by false or irrelevant issues, it is essential to briefly consider *two questions of fact.* It is said, *first, that the mere exchange by the Northern Securities Company of its stock for stock in the railroads did not make the Northern Securities Company the real owner*

of the stock in the railroads, since the effect of the transaction was to cause the Securities Company to become merely the custodian or trustee of the stock in the railroads; second, that as the two railroads were both over-capitalized, stock in them furnished no sufficient consideration for the issue of the stock of the Northern Securities Company. * * * *

P. 367.

"If the power was in Congress to legislate on the subject it becomes wholly immaterial what was the nature of the consideration paid by the company for the stock by it acquired and held if such acquisition and ownership, even if real, violated the act of Congress. If on the contrary the authority of Congress could not embrace the right of the Northern Securities Company to acquire and own the stock, the question of what consideration the Northern Securities Company paid for the stock or the method by which it was transferred must necessarily be beyond the scope of the act of Congress."

P. 371.

"It is said moreover, that the decision of this case does *not* involve the consequence above pointed out, since the *ONLY issue in this case is the right of the Northern Securities Company to acquire and own the stock.* The right of that company to do so, it is argued, is one thing; the power of individuals or corporations, when not merely organized to hold stock, is an entirely different thing. * * *"

P. 372.

"Without stopping to point out what seems to me to be the confusion, contradiction and *denial of rights of property* which the decree exemplifies, let me see if in

effect it is not at war with itself and in conflict with the principle upon which it is assumed to be based.

"Fundamentally considered, the evil sought to be remedied is the restraint of interstate commerce and the monoply thereof, alleged to have been brought about, through the acquisition by Mr. Morgan and Mr. Hill and their friends and associates, of a controlling interest in the stock of both the roads. *And yet the decree, whilst forbidding the use of the stock by the Northern Securities Company, authorizes its return to the alleged conspirators, and does not restrain them from exercising the control resulting from the ownership.* * *"

P. 390.

"Now, it is submitted, that the decided cases just reviewed demonstrate that the acquisition and ownership of stock in competing railroads, organized under State law, by several persons or by corporations, is not interstate commerce, and, therefore, not subject to the control of Congress. * *"

P. 396.

"But, it is said, it may not be denied that the common ownership of stock in competing railroads endows the holders of the majority of the stock with a common interest in both railroads, and with the authority, if they choose to exert it, to so unify the management of the roads as to suppress competition between them. * *"

P. 400.

"Being of the opinion, for the reasons heretofore given, that Congress was without power to *regulate the acquisition and ownership* of the stock in question by the Northern Securities Company, and because I think

even if there were such power in Congress, it has not been exercised by the Anti-Trust act, as is shown in the opinion of *Mr. Justice Holmes, I dissent.*"

These extracts prove that every Judge of this Court thought the question of the lawful absolute ownership of the stock by the Securities Company was important and controlling upon the decision.

Can there from these citations be any doubt that in this court the question of what, if any title the Securities Company took in the railroad stocks was a *material and controlling question?*

That the majority of the Court put its conclusion on the ground that the Securities Company was *not* the lawful purchaser—absolute owner of the railroad stocks, but simply the holding company, Custodian—Trustee—Agent—for, and one of the combination to hold the stock, and through this holding, control both railroad companies and eliminate competition:

That the Securities Company was a mere instrumentality of the combination—that its acquisition of the stock was illegal—for an illegal purpose, and even the continued holding was illegal:

That the minority dissented on the ground that

> "Congress was without power to regulate the acquisition and ownership of the stock in question by the Northern Securities Company"

Mr. Justice White recognized that in the Opinion of the majority of the Court the question whether the Securities Company was the real purchaser and absolute owner was a controlling one.

Indeed he stated that

"it is said * * the *only* issue in this case is the "right of the Northern Securities Company to acquire "and own the stock."

Facts Found by This Court.

This court having found, as we have seen, that an illegal combination was formed under the leadership of Hill and Morgan to control and restrict competition between the Northern Pacific and the Great Northern Railroad Companies, two parallel and competing lines engaged in inter-state traffic, and that the means of carrying out and perfecting the combination was the organization of, and placing in the possession of the Northern Securities Company as a holding Company, the majority of the stock in each of said railroad companies, *inter alia*, found specifically:

That the sole purpose of the organization of the Northern Securities Company was to act as agent or trustee of the Morgan-Hill illegal combination:

That the Northern Securities Company was to be solely a holding corporation, the custodian, for the combination:

That it was organized by the combination, Hill and Morgan, solely as a holding company:

That the Northern Securities Company was a part of the combination; its head and front; its trustee:

That it was a common, corporate trustee:

That as custodian it represented the combination formed between the shareholders of the constituent companies.

That it was the instrument of an illegal combination of which it was the master spirit:

That the Northern Securities Company acquired more than nine-tenths of the Northern Pacific stock and more than three-fourths of the Great Northern stock as custodian of the same; as trustee for those who assigned:

That the actual nature of the transaction by which the Northern Securities Company acquired the railroad stocks was *not* as a lawful purchaser or absolute owner, but simply as custodian for the combination;

If in form it was a purchaser of said railroad stocks, it was not so in fact.

That the Securities Co. *illegally* acquired said railroad stocks and *illegally* held the same.

Decree of the Court.

Having found these facts, and as a consequence from them you carefully considered and then affirmed the following decree:

"That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' denounces as illegal; that *all* of the stock of the Northern Pacific Railway Company and *all* of the stock of the Great Northern Railway Company, now *claimed* to be held and owned by the defendant, the Northern Securities Company, was *acquired* and *is now held* by it *in virtue* of such combination or conspiracy in restraint of trade and commerce among the several States;

"That the Northern Securities Company, its officers, agents, servants, and employees, be, and they are hereby, enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from voting at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever over

the acts and doings of said railway companies or either of them by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants and agents be, and they are hereby respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company or in its behalf by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies, and that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants, and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of the said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies.

"It is further ordered and adjudged that the United States recover of and from the defendants its costs herein expended, the same to be taxed by the Clerk of this Court, and have execution therefor."

"The judgment of the Court is that the decree below be and hereby is affirmed with liberty to the Circuit Court to proceed in the execution of its decree as *the circumstances* may require"

Conclusions From the Words of the Decree.

Speaking only from the words of the decree itself, it is indisputable that by that decree you adjudged—

(I) That the defendants, who included the Northern Securities Company, had entered into a combination in restraint of trade and commerce, such as the Sherman Act denounces as illegal;

(II) That *all* of the railroad stocks
"*now claimed* to be held and owned by the defendant, the Northern Securities Company,"
were both
"acquired",
and, in addition, are
"now held by it"
in *virtue* of such combination in restraint of trade and commerce.

(III) This identical combination, you had before held, was illegal, and you then held that *both* the *acquisition* and the *holding* of the stock was illegal.

The taint of illegality was in the title to the stocks which the Securities Company acquired, and it was illegal for it to further hold said stocks.

All said stocks were acquired and held as part of the scheme—a most material part—to restrict trade and commerce.

(IV) You emphasized the illegality of the acquisition or holding of such stock by restraining the Securities Company from

> "acquiring or attempting to *acquire* further stock of either of the aforesaid railroad companies."

(V) You restrained the Securities Company from voting or collecting dividends or exercising influence as the holder of such stock, and you restrained both the Northern Pacific and Great Northern Railroad Companies from permitting the Securities Company or its attorney—agent—officer—or servant—to so vote or collect dividends, or exercise influence.

(VI) In addition to thus adjudging the illegality of the acquisition and holding of the stock, and prohibiting its use and prohibiting the further acquisition of such stock, you described the title of the Securities Company to the stock as the stock

"which it now holds."—

"by virtue of its holding such stock:"

and in contradistinction, whenever you used the word "own" you qualified it as follows:

"now claimed to be held and owned."—

"which it now claims to own and hold."—

(VII) The decree did not in words authorize the sale of the stock or any other disposition of it save the return to the parties who assigned it to the Securities Company.

Authorization of Return of Stock to the Original Stockholders of the Constituent Companies.

(VIII) You then added as part of the decree:

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

This was the sole and only mode in which by the words of your decree, you permitted the Securities Company to *dispose* of the stock, freed from the taint and restraints upon it.

You did not in this decree permit the Securities Company to *sell* the said stocks freed from the taint and restraint.

You did not use one word in the decree from which it could fairly be inferred that the Securities Company

could in any way assign them freed from the taint and restriction, except the one method you in words permitted, *i. e.*, the return of the stocks.

Even the *return* to the original stockholders of these railroad stocks by the Securities Company, freed from the taint and restraint placed upon them, could not have been done save by the express consent of this court,

BECAUSE

(a) You put such *express* consent in your decree:
Why, if it was not necessary?
Why, if without it, such return could have been made?

(b) You prefaced said consent by saying:
"But nothing *herein* contained shall be construed as prohibiting the Northern Securities Company from *returning* and transferring"
such railroad stocks to the original assignors.

That is,—such return, even freed from the taint and restraint, is prohibited by the former part of this decree, but we now expressly allow it and except it out of the decree.

(IX) You authorized the Securities Company to *return* and transfer to the railroad stockholders such railroad

stocks as the Securities Company had received from each, and you included not only the actual persons who assigned to the Securities Company, but

> "such person or persons as may *now* be the holders and owners of *its* own stock."

(X) This was the sole and only method of transfer that the words of the decree permitted; and the words of the decree did *expressly* authorize such transfer.

In so doing you necessarily determined

(a) That such return was equitable and fair to all the then (and present) stockholders of the Securities Company, for you would not have given such authority if it was inequitable or unfair to any of the stockholders of the Securities Company;

(b) That it was based upon the proposition that the Securities Company did not really own, but merely held the stock—for an illegal purpose—for which purpose it was so assigned;

(c) The present proposed plan of the Securities Company to distribute said railroad stocks pro rata

among all its stockholders was not only not permitted by the words of the decree, but it is inconsistent with, and an evasion of, the decree,

BECAUSE

(1) It is necessarily based upon the proposition, that a return of said railroad stocks to the original assignors is inequitable and unfair; whereas, this decree expressly declares the contrary;

(2) It necessarily asserts that the Securities Company is the real, substantial owner of the stock; whereas this decree asserts the contrary;

(3) The decree adjudged that even the *holding* of the stock by the Securities Company was illegal—and this bound the stockholders of the Securities Company as well as the corporation itself.

Whatever interest the Securities Company had in the stock, it held as trustee for the stockholders of the Securities Company.

> "It is a trust fund held by the corporation as a trustee. * * The shares of the capital stock are usually represented by certificates. Every holder is a *cestui que trust* to the extent of his ownership."
>
> *Farrington vs. Tennessee*, 95 U. S. 686.

If the corporation's *holding* as trustee for its stockholders was illegal, and because of that illegality it was stripped of its power to vote or collect dividends or exercise influence, how could its mere transfer of that stock without the leave of Court to all its stockholders put them in better plight or give them a better title than the corporation had?

> "* * A stockholder is bound by a decree of a "court of equity against the corporation in the en- "forcement of a corporate duty, although not a party "as an individual, but only through representation "by the company. A stockholder is so far an in- "tegral part of the corporation that in view of the "law he is privy to the proceedings touching the "body of which he is a member."
>
> *Hawkins vs. Glenn*, 131 U. S. 329.

By such transfer to *all* stockholders as such—the stockholders of necessity claimed by and through the Securities Company. The Securities Company held all the rights to the stock which they, as stockholders of the Securities Company had. As stockholders of the Securities Company they had no more superior title than the corporation had, *but solely the same as it had.*

By the *return* of the stock to those who had assigned, with the assertion that it was *illegal* for the Securities Company to have acquired the stock, and *illegal* for it to further hold it, the original railroad stockholder was reinvested with the entire title—legal and equitable—to his stock, which he had *before* he assigned to the Securities Company, with the same rights he *before* had of voting, collecting dividends and exercising influence. His title is not of and through the Securities Company, but superior to it. He receives

not as a stockholder of the Securities Company, but as the party who assigned railroad stock to it.

Your decree was to bring about, and, if carried out, it would bring about, the dissolution and suppression of the illegal combination by the undoing of what had been done, and the return to the original assignors of the railway stocks each had assigned to the Securities Company. This was a complete disintegration of the combination. It did not treat as legal or lawful the assignments of the stock to the Securities Company, but, on the contrary, denied that, and it did not only what would effect the dissolution and suppression of the illegal combination, but that which was eminently fair, that is, gave back to each individual exactly what he put into the combination, and thus allowed no one whatever to gain by reason of the illegal combination.

(XI) Your decree did as a fact tie up said stock and rendered it in the hands of the Securities Company unmarketable, so that no prudent person would have purchased the same for anything like its value.

You had declared that the acquisition and holding of the stock by the Securities Company were both illegal, and you denied to that Company the rights of an owner of the stock. You had taken care to give it permission to dispose of the stock in one way, and one way only.

Did not this prevent the Securities Company from selling the stock?

How could it have demonstrated to a purchaser that the purchaser would receive an absolutely good title, untainted by any illegality, and with full rights of ownership, when the Securities Company, who was the vendor, had been brought into court on account of its holding such stock, alleging that both the acquisition and such holding were illegal, and the court had decreed that it was illegal, and had taken away from the Securities Company the right to vote the stock or collect dividends thereon or in any way to act as its owner?

If it could not have given an untainted title, with all rights of ownership, to a purchaser, how can it possibly do this by distributing it to its stockholders?

(XII) *The Northern Securities Company cannot hold this stock and prevent our relief under the doctrine of in pari delicto.*

This court, in that portion of its decree which permitted and authorized the return of the stock to the original assignors, evidently ruled that that doctrine was inapplicable, because if it had been, the court would not have made the order that it did—would not have aided the assignors of the stock to regain them.

In pari delicto means that the court will not give assistance to either of the parties to an illegal scheme, when it is apparent that the plaintiff must rely upon the illegal scheme for his relief. It is enforced as if *sua sponte* by the court. It is never enforced to benefit a party to a scheme who has acquired possession of the property in dispute and thus enabled him to keep property which he honestly does not own, but it is applied by the court in certain cases on the ground that a court of equity will not aid any one who comes to it

with hands soiled with the marks of an illegal scheme, upon which illegal scheme he relies for relief.

The Decree Read in the Light of Your Opinion.

So far we have considered the words of the decree and have not used the Opinion of this Court.

The decree of itself seems clearly to demonstrate the foregoing propositions.

But now let us put this beyond controversy or dispute by referring to the Opinion:

Your conclusions and findings of fact in the Opinion under the early English practice of Courts of Equity would have been incorporated in the decree: under our practice they have the same weight as if they were in the decree.

We *should* then read the decree as if it recited the said *findings*. (*Putnam vs. Day*, 22 Wallace 66.)

You had already in your opinion decided:

p. 346 "In short, the Court may make any order "necessary to bring about the *dissolution* or "suppression of an illegal combination that "restrains interstate commerce."

And that

p. 360 "The Court, in virtue of a well settled rule governing proceedings in equity, may mould its decree so as to accomplish practical results —such results as law and justice demand."

You found:

pp. 325, 326.

> "Under the leadership of the defendants, Hill and Morgan, the stockholders of the Great Northern and Northern Pacific Railway corporations . . . combined and conceived the scheme of organizing a corporation under the laws of New Jersey which should *hold* the shares of the constituent companies . . . . : that pursuant to such combination the Northern Securities Company was organized as the *holding* corporation through which the scheme should be executed; and under that scheme such holding corporation has become the *holder—more properly speaking, the custodian*—of more than nine-tenths of the stock of the Northern Pacific and more than three-fourths of the stock of the Great Northern , . . . "

p. 346

> "The Securities Company is itself a part of the present combination; its head and front; its trustee."

pp. 353, 354.

"It was said in argument that the circumstances under "which the Northern Securities Company obtained the stock "of the constituent companies

> "imported simply an investment in the stock of other corporations, a purchase of that stock, which investment or purchase, it is contended, was not forbidden by the charter of the company and could not be made illegal by any act of Congress.

"*This view is wholly fallacious, and does not comport with the actual transaction. There was no actual investment in any substantial sense*, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was, *not, in fact*, one of that kind.

"However that company may have acquired for itself any stock in the Great Northern and the Northern Pacific Railway Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was *acquired and held* to be used in suppressing competition between those companies. *It came into existence only for that purpose. If any one had full* knowledge of what was designed to be accomplished, and as to what was actually accomplished, by the combination in question, it was the defendant Morgan.

"*In his testimony he was asked, 'Why put the stock of both these (constituent companies) into one holding company?' He frankly answered. In the first place, this holding company was simply a question of custodian because it had no other alliance.' That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a holding company in whose hands, not as a real purchaser or absolute owner, but simply as* custodian were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies, * * *

You at length went over the decree—analyzed it and attentively considered it, and after so doing you said:

P. 354, 357.

> "The decree, if executed, will *destroy, not the property interests of the original stockholders* of the constituent companies, but the powers of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which if done, would restrain inter-state and inter-national commerce."

Conclusions.

From the foregoing—

(1) The words of the decree itself—

(2) The decree read as if it contained the findings of fact hereinbefore cited—

(3) The decree interpreted by this Court—

(4) The decree read in the light of your opinion—

can you doubt that—

the Court found:

> That the Securities Company was organized by the Combination solely as an instrumentality through which to carry out for them their illegal scheme to restrain trade and commerce:
>
> > That it was an indispensable part of the scheme that a majority of the stock of the two railroad companies should be assigned to the Securities Co. so that the Securities Company might manage both railroads, if it did not secure a majority of each stock it could not control said railroads:

That such stock was transferred to it, and the Securities Company became *not* the lawful absolute owner, but simply the holding company, the custodian or agent or trustee of the same for the persons who assigned it:

That the acquisition by the Securities Co. of such railroad stocks was illegal and that it was also illegal for the Securities Co. to even hold such stock:

That all of said stock was acquired and is now held by the Securities Company in virtue of the illegal combination:

That the Securities Company, being the illegal holder or custodian of this stock, the Court denied it the right to vote or collect dividends on the same or exercise any control over either corporation by reason thereof:

The Securities Company thus simply held—and even the *holding* was illegal—these stocks without the rights, however, which made them valuable—*i. e.*, vote; collect dividends; exercise influence.

That if in form it was a purchase of the railroad stocks by the Securities Company it was not so in fact. It received the stocks merely as a holding company, as custodian to carry out the scheme.

Authorization for Return of Stock.

Seeing the dilemma, this Court, following its own conclusions and its own interpretation of the effect of its decree, authorized the return of the stock to the persons who assigned it to the Securities Company.

This was the effective means to disintegrate and destroy the combination.

There would, when this was done, be no joint holdings of either of the railroad stocks—especially no joint holdings of the two railroad stocks by the same persons.

The majority of the stocks of both railroad companies would not be in the same hands.

While the railroad stocks were returned to their original owners, each held *only* the *original* stock in the one railroad he assigned to the Securities Company.

In so returning the stock, the title of each assignee to said stock was not by or from the Securities Company, nor did he rely upon any title of the Securities Company to the stock, but the title of each assignee was superior to, and independent of, and prior to, the holdings of the Securities Company, and the Securities Company simply handed back what each railroad stockholder had given it, and it did this with the authority of this Court to sanction and approve it.

(And from these facts is it not plain that the Securities Company cannot distribute these stocks to its own stockholders and give them an absolute title to the same?

To do so would necessarily be to contradict your foregoing conclusions that the Securities was *not* the absolute

owner of the stock—for only as such owner could it distribute. It would also be to take from the original stockholders of the constituent companies their right to a return of their stocks, and to give these stocks to others and compel us to accept in lieu other stocks.)

Interpretation by This Court of Its Decree.

The interpretation this Court, before its decree was promulgated, gave as the meaning of its own decree, and should now be absolutely controlling:

You then said that

> "The decree, *if executed*, will destroy, *not the property* interests of the original stockholders of the constituent companies, *but* the *power* of the holding corporation as the instrument of an illegal combination of which it was the master spirit to do that which, if done, would restrain inter-state and inter-national commerce."

You anticipated something done in pursuance of the decree—for you in your mandate expressly gave power to the Circuit Court

"to *proceed* in the execution"

of it.

And you had just declared the consequences of it

"if executed."

Remember now your own finding of fact, that the Securities Co. was organized for an *illegal* purpose—that it acquired the stock *illegally* and held it for an illegal purpose, and that it *held it* merely as custodian, and not as lawful owner, and then read the above sentence.

It is simply incredible that this clause can be misunderstood if it is only given the meaning which all its words demonstrate. Read in the light of your opinion, no one can be excused if he seeks to minimize or change its import.

Let it speak for itself and no doubt exists.

(1) It speaks of the whole decree which includes the *return* of the stocks.

(2) It speaks of the "*execution*" of the whole decree which includes the return of the stocks.

(3) Such execution will *not* (it says) destroy "the property interests."

Whose property interests?

The decree says:

"The original stockholders of the constituent companies:"

What were the

"constituent companies"

referred to?

The Northern Pacific and the Great Northern Railroad Companies.

Who were the original stockholders?

Those who assigned to the Securities Co., including appellants.

As the case then stood, the Northern Securities Company was of record the apparent owner of these railroad stocks.

The Court did not deny that the decree would destroy the unlawfully acquired powers of the Securities Company, but only that it would not destroy the property interests of

"the original stockholders of the constituent companies."

Now what property interests had the original stockholders of the constituent companies in and to the stocks of those companies?

Evidently none, if the Court of Appeals is right that the Securities Company was the lawful, absolute owner of all the stocks of said constituent companies, and that the original stockholders therein had parted with their entire title to the same.

If the Securities Company was the lawful owner of the stocks, then it was senseless to talk about the decree not effecting the property interests of the original stockholders in these stocks. It is to convict this Court of error in its own construction of its own decree made prior to the promulgation of the same.

You say it will mean one thing:

The Court of Appeals says it means another.

If the Securities Co. was regarded as the lawful, substantial owner,it is inconceivable that this court could have said:

(a) *Its powers* as the owner of the stocks in these railroad companies was not destroyed when it struck down the right of the Securities Company to either vote or collect dividends on, or to exercise influence by reason of, the holding of such stocks, and rendered such stocks in its possession utterly valueless:

(b) But this court affirmatively said that the property interests of the original stockholders in the constituent companies were not destroyed by the decree, and it of necessity thereby declared that the original stockholders in the constituent companies were the *real* owners of said railroad stocks; and that,

(c) The Securities Company was nothing but their custodian with the illegally acquired powers to vote, collect dividends and exercise influence; and,

(d) It was these illegally acquired powers which the court struck down, and the striking down of which in the hands of the Securities Company did not destroy the property interests of the original stockholders; but,

(e) The court protected these interests in this decree, for it authorized the return of said stocks to the said original stockholders, reinvested with all the rights of ownership, including the right to vote, collect dividends and exercise influence, and it permitted no other disposition whatever by the Securities Company of such stocks.

What were the

"powers of the *holding* corporation"

which the decree admits were destroyed?

The *powers* incident to, and growing out of, the holding by the Securities Co. of the stock of the constituent companies for an illegal purpose.

These powers necessarily included:

(a) Continued holding of the stocks:

(b) Rights to vote—collect dividends on, and exercise influence by reason of, such railroad stocks.

If the Securities Company was the real, substantial owner of the railroad stocks, would not the decree and the denial of the rights to hold—or vote—or collect dividends on, or exert influence by reason of, so owning such stocks

"destroy property interests?"

What would be left of the stock if it could not be voted or dividends collected or influence exerted?

What would be its value?

If, on the contrary, the Securities Company was not the real, substantial owner of the railroad stocks, but held them as custodian for the members of the combination, *i. e.*, original stockholders of the constituent companies, with the powers as registered holder of the stocks to vote, collect dividends thereon and exercise influence by reason of such stocks on the said two corporations, in pursuance of the scheme of the combination, then the denial of the right of the Securities Company to so vote or collect dividends or exercise influence, but at the same time also authorizing the return of the stocks to the original stockholders from whom it received them, was not a denial of the property interests of the original stockholders.

Judge Dallas on your opinion and decree.

Judge Dallas' conclusions as to what this Court decided is in the following words:

> "Some phrases in that opinion, if considered separately, and without reference to the precise subject which was under investigation may seem to sanction the interpretation which the appellees have sought to put upon it; but when it is read as a whole, it becomes quite evident that it was not intended to resolve any question other than that which was before the court. The decree that was under review had enjoined the Securities Company from using the railway shares in furtherance of the scheme declared to be unlawful, but, as we have seen, the right of property in those shares was not at all affected by that decree. The Circuit Court has done only what the actual situation demanded. Its decree has done nothing more than to meet the require-

ments of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose.' 193 U. S. 357. We have been asked to infer from this statement in the opinion that the learned justice who made it intended to affirm that the property interests of the original holders of the railway shares had not been transmuted by their assignment; but no such inference would be warranted. He was not dealing with conflicting claims of title, but with the decree of the Circuit Court, and the plain and natural meaning of the language he used is, that *by that decree* no property interests had been disturbed."

(A) What the learned judge calls "phrases in that opinion,"

were repeated statements of conclusions by this Court in a connected chain of reasoning which led up to what he calls another "phrase," but which you evidently thought was your final conclusion that

> "The actual nature of the transaction which was *only* to organize the Northern Securities Company as a holding company in whose hands, *not as a real purchaser or absolute owner*, but simply as custodian, were to be placed the stocks of the constituent companies."

This court sharply divided, as we have shown ante pp. 4 to 40, on this identical question of whether the Securities Company was the

"real purchaser or absolute owner"

or

"simply custodian"

of the stocks.

You put your decision on the ground that the Securities Company was *not* such

"real purchaser or absolute owner"

but

"simply custodian".

and the majority of the Court of Appeals speaks of this conclusion of yours as

"phrases"

"*considered* separately and without reference to the precise subject which was under investigation."

It says of that conclusion that considered separately it

"may seem to sanction the interpretation which the appellees have sought to put upon it:"

but that the opinion

"when read as a whole"

shows quite evidently it was not intended to solve such question.

Now reading Mr. Justice Harlan's opinion *as a whole*, which starts on page 317 of 193 U. S., that Judge, from page 317 to page 320, states the parties to the case and quotes in full the Sherman Act.

On page 320 he states:

"Let us see what are the facts disclosed by the record."

These facts, he then proceeds to find and state from page 320 to the bottom of page 325.

Then on pages 325 and 326 he states:

"Summarizing the principal facts, it is indisputable upon this record that under the leadership of the defendants, Hill and Morgan, the stockholders of the Great Northern and Northern Pacific Railroad corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound, combined and conceived the scheme of organizing a corporation under the laws of New Jersey which should hold the shares of the stock of the constituent companies, such shareholders in lieu of their shares in those companies to receive on an agreed basis of value, shares in the holding corporation; and pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed.

"And under that scheme such holding corporation has become the *holder,—more properly speaking, the custodian*—of more than nine-tenths of the stock of the Northern Pacific and more than three-fourths of the stock of the Great Northern. The stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation."

On pages 327 and 328 the court discussed the consequences resulting from this scheme and combination, and on page 328 asked the question:

"Such being the case made by the record, what are the principles that must control the decision of the present case? Do former adjudications determine the controlling questions raised by the pleadings and proofs?"

It is thus plain that Mr. Justice Harlan called the preceding findings by him

"the case made by the record,"

and as showing

"the controlling questions raised by the pleadings and proofs."

From pages 328 to 334 is taken up with a discussion of the decisions of this court on the Anti-Trust Act.

At the bottom of page 333 the court took up the averment of the Northern Securities Company that Congress did not have the power to legislate in reference to the owhership of stock in a state corporation.

On page 334 the Judge said:

"It is unnecessary in this case to consider such abstract, general questions."

Then on pages 334 and 335 the contentions in reference to what constitutes inter-state commerce are discussed, and how far Congress may legislate in reference thereto:

The power of Congress under the Commerce clause is then discussed, and on pages 337, 338, 339, 340, 341 and 342 is a discussion of the cases on the question of a combination to control trade; on pages 342, 343, 344, 345, 346, 347, 348 and 349, the power of Congress to pass the Sherman Act.

On pages 351, 352 and 353, the consequences of an adverse decision are considered:

Then on pages 353 and 354 this court concluded as follows:

* * * * *

"It is said in argument that the circumstances under which the Northen Securities Company obtained the stock of the constituent companies.

"Imported simply an investment in the stock of other corporations, a purchase of that stock; which investment or purchase, it is contended, was not forbidden, by the charter of the company and could not be made illegal by any act of Congress.

"*This view is wholly fallacious, and does not comport with the actual transaction. There was no actual investment in any substantial sense*, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was *not, in fact*, one of that kind.

"However that company may have acquired for itself any stock in the Great Northern and the Northern Pacific Railway Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was *acquired and held* to be used in suppressing competition between those companies. *It came into existence only for that purpose. If any one had full* knowledge of what was designed to be accomplished, and as to what was actually accomplished, by the combination in question, it was the defendant Morgan.

"*In his testimony he was asked, "Why put the stock of both these (constituent companies) into one holding company?" He frankly answered. 'In the first place, this holding company was simply a question of custodian because it had no other alliances.' That disclosed the actual nature of the transaction, which was*

only to organize the Northern Securities Company as a holding company, in whose hands, not as a real purchaser or absolute owner, but simply as custodian were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies, the direct and necessary effect of such combination being, as already indicated, to restrain and monopolize interstate commerce by suppressing (or to use the words of this Court in the *United States vs. Joint Traffic Association*) "Smothering" competition between the lines of the two railway carriers."

These extracts are what the court below called

"phrases"

in that opinion.

The *whole opinion* is in harmony with such "phrases" and not as the learned Judge seemed to think in discord with and dissent from them.

Judge Dallas says:

(B) "The right of property in those shares was not effected by that decree";

it only effected the use of the stock.

But this is a singular inference:

The decree found:

(1) That the defendants, which included the Northern Securities Company entered into a conspiracy which the Sherman Act "denounced as illegal:"

(2) That all the railroad stocks now *claimed* to be held and owned by the Securities Company

"was acquired and is (are) now held by it in *virtue* of"

such conspiracy.

If so, the acquisition of the stock was illegal, for the decree included its

"acquisition."

So, also, was its holding, for the decree said

"and is now held in virtue of

such conspiracy,

To decree that the Securities Company acquired and held all its railroad stock

"in virtue of,"

that is, by reason of, and for the sake of and the use of an illegal conspiracy, is certainly to attack its title to that property.

If it was illegal for the Securities Company to acquire the stock and illegal to hold it, how could it have a title to it?

Did not such decree "affect" its property rights?

Then because the stock was so illegally acquired and held, the decree denied the Securities Company the right to vote or collect dividends on, or exercise influence.

All these are property rights of a stockholder.

To deprive one who holds stock of them is certainly to "affect" his

"property rights."

(C) The quotation from Judge Harlan's interpretation of the decree is said by Judge Dallas to mean only that—

"by that decree no property interests *had been* disturbed."

(1) Judge Harlan did not speak of what

"*had been* destroyed,"

but his language was:

"The decree if *executed will* destroy."

He was speaking of the effect the decree would have when it became the decree of the Supreme Court, and when executed as such Supreme Court decree.

(2) Judge Harlan did *not* say that

"no property interests had been disturbed"

but he identifies and particularizes.

He says:

"the property interests of the original stockholders of the constituent companies."

He then distinctly recognizes (does he not) that

"The original stockholders of the constituent companies"

had *property* interests in these stocks, else why would he say those property interests would not be destroyed?

Now what rights does he recognize that the Securities Company had in those railroad stocks?

His language is:

> "The *power* of a holding corporation as the instrument of an illegal combination, of which it was the master spirit, to do that which if done, would restrain inter-state and inter-national commerce."

It simply has a

"power,"

and such power is in

"the *holding* corporation as the *instrument* of an illegal combination."

What was the *power?*

To vote the stocks—

Collect dividends on them—

Exert influence by reason of them.

Now let me read your finding of fact that the Securities Company was

"not (as) a real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies,—such custodian to represent the combination formed between the shareholders of the constituent companies."

As the Securities Company—

Was not the real purchaser—

Was not the absolute owner—

But simply the custodian for the original stockholders of the constituent companies,

Therefore

The Securities Company has simply powers—powers of a mere holding company—and as an instrument of an illegal combination it will exercise the powers.

Depriving the Securities Company of such illegal powers does not deprive the original stockholders of the railroad company of their property interests in these stocks, for this very decree authorizes the return of such stocks to them with all the attributes of ownership.

Judge Dallas uses the word

"disturbed;"

Judge Harlan uses the word

"destroy."

Judge Harlan knew the decree would *destroy* the *powers* of the Securities Company in and to the stocks.

How could Judge Dallas, with all these findings of fact —the finding by the decree of the *illegality* of the acquisition, as well as the holding of the railroad stocks—with this interpretation of that decree by Judge Harlan—the unlawful conspiracy staring him in the face, and also the unlawful purpose for which the Securities Company was organized, *actually find* that the Northern Securities Company was a lawful corporation—organized for a lawful purpose—and had lawfully acquired and lawfully, absolutely owns these railroad stocks?

How could he so misapprehend such plain language as this court used—which distinctly found exactly the contrary of his own conclusions?

I.

By the affirmance of this Court this decree in the Government case became the decree of the Supreme Court of the United States and binding upon all parties and privies and other courts.

The meaning of the decree is to be ascertained from its words and your own opinion, and the only liberty or authority any lower Court has is

"to proceed in the *execution thereof*,"

This has been distinctly ruled in different cases, but is perhaps nowhere more aptly stated than in

In re Potts, Petitioner, 166 U. S., 265, where the court said:

> "When a case has been once decided by this court on appeal, and remanded to the Circuit Court, *whatever was before this court, and disposed of by its decree, is considered as finally settled.* The Circuit Court is bound by the decree as the law of the case; and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it further than to settle so much as has been remanded. If the Circuit Court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court. But the Circuit Court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. The opinion delivered by this court, at the time of rendering its decree, may be consulted to ascertain what was intended by its mandate; and either upon an application for a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly."

In *Durant vs. Essex County*, 101 U. S., 555, you said:

> "On a mandate from this Court affirming a decree the Circuit Court can only require our order and proceed with the execution of its own decree as affirmed. *It has no power to rescind or modify what we have established.* Our judgment by a divided court is just as much our judgment for all the purposes of the case in hand as if it had been unanimous. The result of the

appeal to us was an affirmance of what had been done below.

"*After the appeal had been taken the power of the court below over its own decree was gone. All it could do after that was to obey our mandate when it was sent down.*"

In *Sandford Fork & Tool Co.*, Petitioner, 160 U. S., 247:

"When a case has been once decided by this Court on appeal and remanded to the Circuit Court, whatever was before this Court and disposed of by its decree is considered as finally settled. The Circuit Court is bound by the decree as the law of the case and must carry it into execution according to the mandate. That Court cannot *vary it* or *examine it for any other purpose* than execution, or give *any other* or *further relief* or review it even for apparent error upon any matter decided on appeal; or *intermeddle* with it further than to settle so much as has been remanded. * * * *The opinion delivered by this Court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate; and * * * it is for this Court to construe its own mandate and to act accordingly.*"

This was cited and approved in *In re Potts*, 166 U. S. 265.

If there be a controversy over the meaning of your mandate and decree that is to be settled by the opinion.

"delivered by this court at the time of rendering its decree:"

If your mandate and decree needs construction, it must "be for this court to construe its own mandate:"

If the plain meaning of the plain words used by this court are to be departed from, it cannot be that any authority less than this court can authorize that.

To permit a construction by the lower Court which disregards and renders nugatory the plain language of your opinion, which finds the essential facts in controversy directly contrary to the finding of this court, and then approves of a mode of action by the defendant in disregard of, and different from, that pointed out by you, is to substitute the judgment of the lower court for your own and destroy the supremacy of this, the highest court in the land.

As was said in *Durant vs. Essex County*, 101 U. S. 555, the Circuit Court

"* * * has no power to rescind or modify what *we* have established,"

not even if as you said *supra*, there is

"apparent error"

in our decision.

II.

The opinion of the Supreme Court is part of the record and may be freely resorted to to determine what this court has decided.

This Court has itself so decided.

In re Potts, 166 U. S. 265 the Court said:

"The opinion delivered by this Court at the time of rendering its decree may be consulted to ascertain what was intended by the mandate."

In the *National Foundry Company vs. Oconto Water Supply Company*, 183 U. S. 217, the Supreme Court considered the question whether the plea of *res adjudicata* applied in the case then pending, and then said, p. 234:

> "In order to correctly decide what was concluded by the decision of the Circuit Court of Appeals in the creditors' suit and the final decree entered in such case, it must be ascertained who were the parties to that case, what were the issues therein presented for adjudication and what was decided thereon. It is elementary that if from the decree in a case there be uncertainty as to what was really decided, resort may be had to the pleadings and to *the opinion of the court* in order to throw light upon the subject."

In *Baker vs. Cummings*, 181 U. S. 124, the court looked at the opinion of the lower court to determine the ground upon which the case had been decided.

To the same effect see

Last Chance Mining Co. vs. Tyler Mining Co., 157 U. S. 683–690.

In the *Southern Pacific Co. vs. the United States*, 183 U. S. 519–532, the main question was whether a certain map had been filed, and the court examined the opinion of the court below to ascertain what the facts were:

"This which is apparent from the foregoing quotations is emphasized by the full discussions in the opinions, as well as by the allegations in the pleadings upon which the cases were tried. That fact having been determined must be taken in the present suit as not open to dispute."

Whenever the question is as to what was decided in the prior case, and the decree is not clear, resort may be had to the opinion.

United States vs. Norfolk Ry. Co., 114 Fed. Rep. 686.

In *Russel vs. Russel*, 129 Fed., 434-438, (C. C. D., N. J., April 15, 1904,) J. Archibald said:

"But the appeal removed the case in its entirety to the higher court, and it is the judgment there rendered that must control, which has to be determined by the views expressed by the court in the opinion filed. * *

"The ultimate conclusion reached in the former suit, as expressed in the opinion of the Court of Errors and Appeals, must therefore determine how far it is a bar in this. Looking into the opinion, it unquestionably disposes of the complainant's right to reform by parol the anti-nuptial agreement, and have it specifically enforced."

To determine what questions were decided and on what the decree was rested, the opinion of the Court deciding the case may be examined.

West vs. Brashear, 14 Peters, 342.
DeSollan vs. Hanscome, 158 U. S., 221.
Cromwell vs. County of Sac, 94 U. S., 359.
Strong vs. Grant, 2 Supreme Ct. (D. C.) 222-223.

Indeed, under our practice, the opinion *must* be examined, for it, as a rule, and not the decree or judgment, shows on what the Court passed.

As the Supreme Court of Wisconsin said in the *Town of Fulton vs. Pomeroy*, 111 Wisconsin, 668:

> "The opinion of this Court is not a mere statement of reasons like an opinion of the trial court, but constitutes the findings of fact and conclusions of law upon which this Court bases its judgment; it is a decision as well as an opinion, and is the only paper from which it can be ascertained what are the conclusions of this Court either upon the facts or upon the law."

In *Barton's Suit in Equity*, page 150, he states that formerly in England the decree in equity included the pleadings and the evidence, but that now the decree in England

> "merely recites the substance of the pleadings and the facts on which the court founds its judgment. In the United States the decree usually contains a mere reference to the antecedent pleadings, without embodying them, *or any special facts* upon which it is rendered."

Rule 86 of the Supreme Court of the United States in Equity forbids the decree reciting the pleadings or report of master, and then gives the beginning of a form which indicates the order of the court alone.

In *Putnam vs. Day*, 22nd Wall. 66, the Supreme Court of the United States in speaking of what constituted the record in the case, said:

"It is true that in our practice the final decree does not contain a summary of the facts as it did in the English practice, which summary was examinable on a bill of review; but to countervail this absence of statement in the decree we have adopted the practice of looking back of the decree into the whole record of the pleadings and proceedings, including orders, masters' reports, &c., together constituting what is generally regarded as the record in the cause and necessary to be examined in order to a proper understanding of the decree itself. This makes the record similar to that of a common law action, the decree being the judgment of the law upon the allegations of the parties and the conclusion which the Court deduces from the proofs. But the conclusions of fact deduced from the proofs are not spread upon the record *in extenso* unless through the medium of a report made by a master or commissioner."

After citing the 86th rule in equity, the Court further said:

"The decree, it is true, may proceed to state conclusions of fact as well as of law, and often does so for the purpose of rendering the judgment of the Court more clear and specific. The record thus made up constitutes the basis of examination on a bill of review, but it never contains the proofs adduced in the cause."

If the Court distinctly finds the facts in its opinion, as the Supreme Court did in Judge Harlan's opinion, why are not these as much part of the record as the finding of facts by a master?

It is believed that the practice in the Supreme Court of United States as evidenced by the opinions of that Court its form of decree and its mandate, conclusively show (as per the opinions hereinbefore cited) that the opinion of the Court

finds the facts, and this finding of facts is as conclusive as if it was formerly recited in the decree.

III.

As parties by representation in the Government Case, we are entitled in our own right to plead or give in evidence against, and as binding upon, the Securities Company, the conclusions in that case on the same questions which arise in this—

Even if—:

(a) The cause of action in the two suits is different:
(b) The scope of the prior action included other questions:
(c) The testimony in the two suits is different:
(d) The parties were different if the present parties were parties to the Government Case:
(e) The form or measure of relief in the two suits is different:

In *Cromwell vs. County of Sac*, 94 U. S. 352, the doctrine is thus stated.

> "In considering the operation of this judgment it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action, upon the same claim or demand, and its effect is an estoppel in another action between the same parties upon a different claim or cause of action.
>
> "In the former case the judgment, if rendered upon its merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claims or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was of-

fered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for the purpose. * * If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence.

"But where the second action between the same parties *is upon a different claim or demand, the judgment* in the prior action operates *as an estoppel only as* to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated or determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

In the *Lumber Company vs. Buchtel*, 101 U. S. 638–639, the Supreme Court of the United States said:

"The finding of the referee upon which the judgment (in the first action) was rendered—and this finding, like the verdict of a jury, constitutes an essential part of the record of the case—shows that no respresentations as to the quantity of timber on the land sold were made to the defendant by the plaintiff, or in his hearing, to induce the execution of the contract of guaranty. This finding having gone into the judgment is conclusive as to the facts found in all subsequent controversies between the parties on the contract. Every

defense requiring the negation of this fact is met and overthrown by that adjudication."

In *Southern Pacific Railroad Co. vs. United States*, 168 U. S. 48, the court elaborately reviewed all the cases and said:

"It is said, however, that under the pleadings and evidence in this *collateral* proceeding, it is open to the Southern Pacific Railroad Company to renew the contest as to the sufficiency of the maps of 1872 filed by the Atlantic and Pacific Railroad Company and to show that they were not maps of definite location.

"Is this position consistent with the settled rule of law as to the conclusiveness between the parties and their privies, of the final determination by a court of competent jurisdiction of matters *put in issue by the pleadings?*

"The importance of this question, independently of the magnitude of the interests to be effected by our decision, and of the earnest contention of learned counsel, justifies a reference to some of the adjudged cases, showing the grounds upon which this salutary rule rests.

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, *cannot be disputed* in a subsequent suit between the same parties or their privies; *and even if the second suit is for a different cause of action, the right, question or fact once so determined, must, as between the same parties or their privies, be taken as conclusively established*, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to

secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.

"Among the cases in this court that illustrate the general rule are *Hopkins vs. Lee*, 6 Wheat, 109-113; *Smith vs. Kernochen*, 7 How., 198-216; *Thompson vs. Roberts*, 24 How., 233, 240; *Washington, Alexandria & Georgetown Steam Packet Co. vs. Sickles*, 24 How., 333, 340, 341, 343; *Russell vs. Place*, 94 U. S., 606, 608; *Cromwell vs. Sac County*, 94 U. S., 351; *Campbell vs. Rankin*, 99 U. S., 261; *Lumber Company vs. Buchtel*, 101 U. S., 638; *Bissell vs. Spring Valley Township*, 124 U. S., 225, 230; and *Johnson Company vs. Wharton*, 152 U. S., 252.

* * * *

"The latest expressions of opinions by this court on this question are in *Last Chance Mining Co. vs. Tyler Mining Co.*, 157 U. S. 683, 691, and *New Orleans vs. Citizens Bank*, 167 U. S. 371, 396. In the first of these cases it was held that a judgment by default in favor of the Last Chance Mining Company against the Tyler Mining Company for a parcel of land embraced within the boundaries of certain mining claims, alleged to have been legally located and to have belonged to the former company precluded the latter company from contending in a subsequent action for part of a mineral vein not embraced within the former suit, but within the mining claims involved in the first suit, that the mining claims in question had not been legally located—the court observing that 'a judgment

by default was just as conclusive an adjudication between the parties of what is essential to support the judgment as one rendered after answer and contest,' the essence of estoppal by judgment being that 'there has been a judicial determination of a fact, and the question always is, has there been such determination, and not, upon what evidence or by what means was it reached?'

"In *New Orleans vs. Citizens Bank*, it was held that the final and unreversed judgment of a court in Louisiana of superior jurisdiction upon the issue, duly raised by the pleadings, whether the bank was exempt by contract with the state from taxes assessed against it for particular years, concluded that question, as between the same parties and their representatives, in respect of taxes assessed against it for subsequent years. In that case the court said: 'The estoppal resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists even although there be different demands, when the question upon which the recovery of a second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies.'

"*In view of these adjudications, it would seem that the controlling inquiry is whether, under the pleadings in the former cases, the sufficiency of the Atlantic and Pacific maps of 1872 as maps of definite location, was a matter in issue and determined as between the United States and the Southern Pacific Railroad Company. That that matter was in issue and was actually decided in the former cases, is too clear* to admit of doubt. That it was material is equally clear."

The rule is laid down in *Black on Judgments*, as follows, (Section 610, part 2):

> "But it often happens that some one point (such as the employment of an agent) may be put in issue in two suits between the same parties in which, nevertheless, the causes of *action are as widely different as it is possible to imagine them; and the first judgment will be held conclusive of that point in the second suit.*"

In *Burlen vs. Shannon*, 99 Mass. 202, the Supreme Court of Massachusetts said:

> "When a fact has once been determined in the course of a judicial proceeding, and a final judgment has been rendered in accordance therewith, it cannot be again litigated between the same parties, without virtually impeaching the correctness of the former decision, which, from motives of public policy, the law does not permit to be done.
>
> "The estoppel is not confined to the judgment, but extends to *all facts* involved in it, as necessary steps, or the groundwork upon which it must have been founded. It is allowable to reason back from a judgment to the basis upon which it stands upon the obvious principle that, where a conclusion is indisputable and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion.'"

Even if the prior case was actually decided on another ground which made unimportant the point or question passed on, yet this point or question raised by the pleadings and once passed on, is conclusive.

This was directly decided by this Court in the case of *Railway Co. vs. Schutte*, 103 U. S., 143, where you said:

> "The point was directly made by the pleadings and as directly passed on by the Court. Although the bill in the case was finally dismissed because it was not proved that any of the State bonds had been sold, the decision was in no just sense dictum. It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended."

In *Black on Judgments*, Vol. II, section 609, the rule is laid down:

> "It is a fundamental and unquestioned rule that a former judgment when used as evidence in a second action between the same parties or their privies, is conclusive upon every question of fact which was *directly* involved *within* the issues made in such former action, and which is shown to have been *actually* litigated and determined therein."

The former decree is not conclusive of any matter which was merely incidentally cognizable in the former action or of any matter to be only inferred by argument.

Duchess of Kingston case, 20 Howard State Trials, 538.

But it is conclusive, says the Supreme Court of Massachusetts, in *Burden vs. Shannon*, 99 Mass. 200 on

> "all facts involved in it as necessary steps or the ground work upon which it was founded."

It is conclusive on whatever was the matter in issue or points in controversy upon the determination of which the finding or verdict was rendered.

Black on Judgments, Sec. 614 and cases cited.

The appellants, as parties by representation in the Government case, are entitled in their own right to set up and assert the decree in that case as against the Northern Securities Company in this case.

Whenever a final decree is entered, especially by the court of last resort, every party to that decree, whether plaintiff or defendant, whether personally present or merely by representation, is of right entitled to set up and plead that decree in all subsequent litigation between the same parties affecting the same property. The decree fixes and forever settles certain questions, and such judgment, it is the right of each party or privy to set up as between himself and the plaintiff, and also between himself and any co-defendant:

Thus Mr. Justice Story in his work on Equity Pleadings, Sec. 372, says:

> "* * * for then (after decree) the rights of the parties are ascertained; and the plaintiff and the defendant *are equally entitled to the benefit of the decree* and equally have a right to prosecute it."—

Dan. Ch. Pl. Pr., Vol. 2,* page 1539 states the ruleas follows:

> "But although the general rule is strict, that, before decree, a defendant cannot sustain a bill of revivor, the case is different after decree, and the suit may be revived at the instance of a defendant, if the plaintiffs, or those standing in their right, neglect to do it; *for then the rights of the parties are ascertained, and plaintiffs and defendants are equally entitled to the benefit of the decree, and have a right to prosecute it.* o o o But it seems to be now held, that it is not in cases of account only that a defendant can revive, but that he may do so wherever he has an interest. He must, however, have some interest under the decree; that is an interest in the further prosecution of the suit."

In *Winton's Appeal*, 97 Pa. 393, a decree was entered and affirmed by the Supreme Court directing a conveyance to be made by the defendant upon the payment of certain monies by plaintiff. The plaintiff refused to carry out the decree, and the defendant filed a supplemental bill to enforce it. The Court sustained the bill, saying:

> "That a bill may be filed for such purpose is well settled. It is true it cannot vary the principle of the decree. Its province is to carry out the decree, and to give full and complete effect to it as it exists: *Hodson vs. Ball*, 1 Phil. Ch. 177, *Adam's Equity*, 416, where several authorities are cited."

In *Griffin vs. Spence*, 69 Ga. 397, the Court states the rule as follows:

> "The bill may be exhibited by one not a party, or deriving title under a party to the decree, if he has similar interests, and cannot, without an execution of the

decree, obtain a determination of his own rights. An instance of a bill of this description is *State vs. Mayor*, 24 Ala. 701. A decree has been rendered for the abatement of a public nuisance, on a bill filed by the Attorney General in the name of the State. Citizens whose rights and interests were affected by the nuisance, and who were, therefore, concerned in its abatement, were permitted to intervene for the revivor and enforcement of the decree. And a decree which the complainant has suffered to abate, may be revived at the instance of a defendant, if the complainant or those standing in his right neglect to do it; '*for then the rights of the parties are ascertained, and plaintiffs and defendants are equally entitled to the benefit of the decree, and have a right to prosecute it.*' 2 Dan. Ch. Pr. 1539. When an abatement occurs before decree, the suit can be revived only by the complainant or those claiming under him, since no one can be compelled to commence, renew or revive a suit against another. 2 Dan. Ch. Pr. 1539 *Griffith vs. Bronaugh*, 1 Bland Ch. 547. After decree, when the rights of the parties are ascertained, if the defendant has an interest in the execution of the decree, or if he has rights involved which require a revivor, he will be allowed to revive it. *Benson vs. Wolverton*, I. C. E. Green (16 N. J. Eq.) 110 *Peer vs. Cookerow*, 2 Beasley, (13 N. J. Eq.) 136."

It is not material whether the scope of the former action was wider or narrower than that of the present suit, the fact that additional stocks were involved in the former action does not effect the conclusiveness of the finding in the former action on the present Northern Pacific stock now in dispute and which was also in dispute in the former action.

Black on the Law of Judgments, paragraph 609, Section 1.

The former judgment is still conclusive though the evidence in the subsequent case may be different. If the question was once in issue and was actually determined by a competent court, it cannot be further litigated and it is equally conclusive when given in evidence as if it was specially pleaded by way of estoppel.

Black on Judgments, paragraph 609, Section 2.

As this Court said in *Last Chance Mining Co. vs. Tyler Mining Co.*, 157 U. S. 691.

"* * *the question always is*, has there been such determination, and *not* upon what evidence or by what means it was reached."

Southern P. R. R. Co. vs. U. S., 168 U. S. 48.

It is not necessary that all the parties to the original litigation (*United States vs. Northern Securities Company*) should be the same in the subsequent litigation.

The only thing required is that the parties in the second litigation were parties to the litigation, the decree in which is relied upon. If this were not so, the effect of a former recovery could always be avoided by adding a new party.

Thompson vs. Roberts, 24 Howard 240.

Smith vs. Kernochen, 7 Howard 217.

Wilson vs. Buell, 117 Ind., 315-318.

Wells on Res Adjudicata, Sec. 35,

Lawrence vs. Hunt, 10 Wendell, 80.

This includes all persons who are privies and in whose interest the suit is brought or defended.

Freeman on Judgment, Sec. 154.

"Hence all privies whether in estate, in blood, or in law, are estopped from litigating that which is conclusive upon him with whom they are in privity."

1 Greenleaf Ev. Sec. 523.

It is immaterial that a different form or measure of relief is asked in the second action.

Green vs. Bogue, 158 U. S., 478-502.

Where there are several grounds of recovery or defence on which the decree may have been rested, said decree will be conclusive on the specific findings, which led up to the proposition, on which the Court decided the case, and what that ground was may be determined by evidence *aliunde* where the decree itself is silent on it.

Russell vs. Place, 94 U. S. 606.

De Sollar vs. Hanscome, 158 U. S. 216, 221.

Flint Natl. Bk. vs. City of Covington, 129 Fed. Rep. 798.

Hawes vs. Water Co., 5 Sawyer, 287.

The conclusions of this Court in the Government case were as conclusive between the co-defendants—the stockholders of, and the Northern Securities Company itself, as if these stockholders had individually been parties plaintiff or defendant to the litigation.

In *Corcoran against the Chesapeake Canal Company*, 94 United States 741-744, this court said:

"It is said that Corcoran and his co-trustees, the canal company, and the State of Maryland, were all defendants to that suit, and that as between them no issue was raised by the pleadings on this question, and no adversary proceedings were had.

"The answer is, that in chancery suits, where parties are often made defendants because they will not join as plaintiffs, who are yet necessary parties, it has long been settled that adverse interests as between co-defendants may be passed upon and decided, and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the Court and passed upon by its decree. * * *

"It is also argued that in that suit Corcoran was only a party in his representative capacity of trustee, and he here sues in his individual character as owner of the bonds and coupons, and in this latter capacity is not bound by that decree. * * *

"But why is he not bound? It was his duty as trustee to represent and protect the holders of these bonds; and for that reason he was made a party, and he faithfully discharged that duty. It would be a new and very dangerous doctrine in the equity practice to hold that the *cestui que trust* is not bound by the decree against his trustee in the very matter of the trust for which he was appointed. If Corcoran owned any of these bonds and coupons then he is bound, because he was representing himself. If he has bought them since, he is bound as privy to the person who was represented. *Kerrison, Assignee, vs. Stewart, et. al.*, 93 U. S. 155, and the authorities there collected."

IV.

The former opinion and decree of this Court is conclusive even on this Court when the same case comes back here, and certainly so where that former opinion and decree is set up as conclusive in another litigation where the parties are not all the same, and where the complainant in the former case, the United States, is not a party to the second.

This Court said in *Roberts vs. Cooper*, 20 How. 467–481:

> "It has been settled by the decisions of this Court that, after a case has been brought here and decided, and a mandate issued to the Court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the Court on the first writ of error can be reheard or examined on the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. In chancery a bill of review is sometimes allowed on petition to the Court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate of chances from changes in its members. (See *Sizer vs. Many*,16 How. 173; *Corning vs. Troy Iron Co.*, 15 How., 466; *Himely vs. Rose*, 5 Cranch, 515; *Canter vs. The Ocean Insurance Co.*, 1 Pet. 511; *The Santa Maria*, 10 Wheaton, 431; *Martin vs. Hunter*, 1 Wheaton; and *Sibbald et al. vs. United States*, 12 Pet. 488."

In *Barney vs. Winona, etc. R. R. Co.*, 117 U. S. 231, the Court said:

> "We recognize the rule that what was decided in a case pending before us on appeal, is not open to reconsideration in the same case on a second appeal upon similar facts. The first decision is the law of the case, and must control its disposition."

In the recent case of *United States vs. Camou*, 184 U. S. 574, Mr. Justice Shiras said:

> "Upon this second appeal we have only to consider whether the Court of Private Land Claims reached its final decree in due pursuance of the previous opinion and mandate of this court. The decision there made is the law of the case, and is not open for reconsideration in the subsequent appeal. This subject was recently considered in *Illinois vs. Illinois Central Railroad*, 184 U. S. 77, and it was there shown that it is the settled law of this court that, after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined on the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. In chancery a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances for changes in its members."

To the same effect are:
Thompson vs. Maxwell, etc. Co., 168 U. S. 456.
Yazoo, etc, Ry. Co. vs. Adams, 180 U. S. 7
Great Western Tile Co. vs. Burnaham. 162 U. S. 343.
Chaffin vs. Taylor, 116 U. S. 567.
Clark vs. Keith 106 U. S. 464.
Supervisors vs. Kenniott, 94 U. S. 498.
Tyler vs. Maguire, 17 Wall 283.

V.

The appellants were by representation parties and privies in the Government case, and therefore are in their own right entitled to set up the findings and conclusions of this Court in that case as res adjudicata in any subsequent litigation between themselves and the Northern Securities Co. so far as reyards the issues raised and decided in that case.

Though Judge Dallas did not discuss, he assumes the correctness of this position,for he says,if you did pass on the question here in dispute he would bow to that decision.

We were parties and privies in the Government case: As—:

(a). Stockholders in the Northern Securities Co. and thus represented by it:

(b). One of a class there represented by Morgan, Hill and others:

(c). As *cestuis que trustent* of the Northern Securities Co., apart from the trust attaching to its stockholders as such, and there represented in this way by the Securities Co:

(d). As a stockholder in the Northern Pacific R. R. Co., who was a party in the Government case:

(A). As stockholders of the Northern Securities Co.

There cannot be any doubt that a corporation ordinarily as plaintiff or defendant in a case represents all its stockholders, and that such stockholders are not only not indispensable, but neither necessary nor proper parties to the litigation, but are bound by a judgment or decree against the Corporation.

In *3d Cook on Corporations, Section 750*, it is said:

> "In general, a corporation represents and binds the stockholders in bringing and defending suits which involve the rights and obligations of the corporation, and binds them as fully as in the making of contracts."

(Section 750, p. 1934:)

> "A stockholder of a corporation is so far a privy to a judgment against the corporation that he cannot attack the judgment in any collateral proceeding."

In *Hendrickson vs. Bradly*, 85 Fed. Rep. 516, the C Court of Appeals (8th Circuit) said:

> "A stockholder of the company is equally bound and concluded for the reason that *he is an integral part*

of the coporation, as, *in contemplation of law*, 'he was before the court in all the proceedings touching the body of which he was a member.' *Sanger vs. Upton*, 91 U. S. 56; *Wilson vs. Seymour*, 40 U. S. App. 567, 22 C. C. A. 447, and 76 Fed. 678. As aptly said by Jackson, J., in *Stutz vs. Handly*, 41 Fed. 537:

'It cannot be relitigated in this case for the reason that the defendants, as shareholders, being represented by the corporation in that suit, have already had their day in court on this question.'"

In *National Foundry & Pipe Works vs. Oconto Water Company*, 68 Federal Reporter, p. 1007, the Court held:

"A stockholder of a corporation is so far a privy to a judgment against a corporation that he cannot attack the judgment in any collateral proceeding."

In *Wilson vs. Seymour*, 76 Fed. Rptr., 681, Circuit Judge Thayer, considering the question of *res adjudicata*, said that it was

"the well established doctrine that the stockholders of a corporation are in privity with the corporation as to all corporate matters, and in the absence of fraud are bound by a decree against the corporation * *."

In *Herman on Estoppel and Res Judicata* the law is thus stated, pp. 154-165:

"Every person whom the parties plaintiff and defendant represent in the suit are bound as privies by the

judgment. A corporation represents and binds the stockholders in all matters within the limits of its corporate power. * * *Among the fundamental powers of a corporation are those of bringing and defending suits affecting the rights and obligations of the corporation, in which it represents and binds the stockholders as fully as in the making of contracts.* In any ordinary action or suit against the corporation to establish and recover a debt the stockholders are neither necessary or proper parties; they are represented by the corporation; *and if they in their individual capacities are allowed to intervene at all, it can only be in the name of the corporation.* * * * *Hence, whatever concludes or affects a corporation binds and concludes all of its stockholders who compose the corporation,* and therefore a judgment against a corporation, unless it was procured by fraud or collusion, is conclusive upon the stockholders, as well as against the corporation and its property."

Secor vs. Singleton, 41 Fed. Rep. 725.

In the *Great Western Telegraph Co. vs. Purdy*, 162 U. S. 329, the facts were that the court had made a decree for a call or assessment upon all the stockholders of the corporation. Purdy was a stockholder, but he was not a party to the litigation except through the corporation which was a party, and in which suit the court decreed that there was necessity for, and there should be an order for a call or assessment upon all the stockholders of the company. The Supreme Court of the United States held that such a decree,

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> "was conclusive evidence of the necessity for making such assessment and to that extent bound every stockholder without personal notice to him."

This left the stockholder free in the action against him for the assessment to set up any individual defense or equity he might have against the suit which did not involve the consideration of the necessity of the assessment which the court had already determined, and which was conclusive upon him.

So in the case at bar. The Supreme Court of the United States settled finally the title which the Northern Securities Company held to the stocks of the Northern Pacific and Great Northern, and to the further fact that it was an equitable and proper mode of the practical dissolution of the Northern Securities Company to retransfer the stocks to the original parties who assigned them to the Northern Securities Company. The decree did not, however, pretend to settle any individual claim which any one stockholder as an individual, and not merely as a stockholder, might have, which did not contradict or impair the decree of the Supreme Court settling the question of title and authority to retransfer as aforesaid.

A like case in the Supreme Court of the United States, is *Hawkins vs. Glenn*, 131 U. S. 319. In a case to which Glenn was not a formal party a decree was made that the stockholders of the corporation should be assessed, and Glenn pleaded that he was not a party to the litigation and therefore was not bound. The court said:

> "Sued after such an order of court, the defendant does not deny the existence of any one of the facts upon which the order was made, but contends that there has been no call as to him, because he was not a party to the cause between creditor and corporation. We understand the rule to be otherwise, and that the stockholder is

bound by a decree of a court of equity *against the corporation* in enforcement of a corporation duty, although not a party as an individual, but only through representation by the company.

"A stockholder is so far an integral part of the corporation that, in view of the law, he is privy to the proceedings touching the body in which he is a member.

"*Sanger vs. Upton*, 91 U. S. 56, 58, in which case it is also said: 'It was not necessary that the stockholders should be before the court when it (the order) was made, any more than that they should have been there when the decree of bankruptcy was pronounced. That decree gave the jurisdiction and authority to make the order. The plaintiff in error could not, in this action, question the validity of the decree; and for the same reasons she could not draw into question the validity of the order. She could not be heard to question either, except by a separate and direct proceeding had for that purpose.' As against creditors there is no difference between unpaid stock 'and any other assets which may form a part of the property and effects of the corporation,' (*Morgan County vs. Allen*, 103 U. S. 498, 509) and the 'stockholder has no right to withhold the funds of the company upon the ground that he was not individually a party to the proceedings in which the recovery was obtained.' "

Glenn vs. Williams, 60 Maryland 93, 116,

In *Hancock National Bank vs. Farmers*, 176 U. S. 640, the court held that a judgment against the corporation bound the stockholders, even where they resided in different States,

and the individual liability of each stockholder might be enforced.

Same effect.

Whitman vs. Oxford National Bank, 176 U.S. 560.
Flack vs. Conn., 109, U. S. 371.

In *Hall vs. Hardon*, 95 Fed, Rept., 759, the doctrine is thus stated:

> "* * * the stockholder is so far an integral part of the corporation as to be privy to the proceedings against it. * * *"

and is conclusively bound by a judgment against the corporation.

Central Fruit Co. vs. Western R. R. Co.. 89 Fed. Rept. 24.

VI.

That the complainants in the present case were to some extent through the Northern Securities Campany represented in the Government case is undoubted, and appellees admit. Now how far and for what purpose were they so represented? The following shows the appellees' position:

> "In regard to such rights and interest as were or might have been held by the said plaintiffs as stockholders of this defendant in common with all other stockholders of this defendant and in proportion to their respective holdings of this defendant's stock, but not in regard to anything which might be the subject of claim by the plaintiffs herein or any of them adversely to this defendant or to its other stockholders."

According to this only

(1) As to such rights and interests as were "or might have been held"

by the plaintiffs as stockholders of this defendant in common with all other stockholders of this defendant:

(2) In proportion to their respective holdings of this defendant's stock:

(3) Not in regard to anything that may be the subject of claim by any one stockholder against the corporation:

Is this a correct statement of the rule?

One of the fundamental common law rights and duties of a corporation is to sue and be sued. When it sues or is sued the litigation involves corporate property rights or duties. In so far as its property or its rights or duties are concerned the corporation represents all its stockholders, and in one sense all the stockholders have one and the same interest in common and in proportion to their stock.

Where one becomes a stockholder in a corporation he and the corporation, by virtue of their relation as such, agree that the corporation shall defend for him all attacks on the corporate property rights or duties, and he virtually appoints the corporation as his agent with full authority to so do.

For example, replevin is brought against the corporation for personal property, or ejectment for real estate; here the question involved is the ownership by the corporation of the property, real or personal, and the judgment in favor of or against the corporation finally determines the title of the corporation to the property, and through it also of its stockholders who were prives and represented in the suit by the corporation. This must always be so, else after a judgment obtained against the corporation any one stock-

holder could again raise the question of title and there would be almost interminable litigation.

But if this be so as to the ordinary judgment in a controversy where the alleged individual owner of the property sues, it is evident, it must be equally true whatever the judgment be that the Court enters, provided it relates to the title of the property, the subject matter of the litigation. Thus, if in a suit of A. B. against the corporation, the Court determines that the corporation holds the property merely as trustee for A. B., the stockholders of the corporation are still just as surely bound as if the judgment had been flat against, or in favor of the corporation. The qualified nature of the judgment does not in the least detract from its finality or binding effect through the corporation on the stockholders. And whoever the plaintiff in the suit against the corporation touching its property may be, the result must always be the same as to the finality of the judgment against the corporation and its stockholders, provided always such plaintiff may rightfully raise the question of title to the property.

As the stockholders' claim to the property in the possession of the corporation must always be *through* the corporation, it does follow in ordinary cases where A. B., alleging to be an outside owner, sues, the corporation represents all the stockholders in common, and to the extent of their respective holdings and by one and the same title.

But if the suit last suggested be brought by one who does not claim title to the property, but who is lawfully entitled, as was the United States in the Government Case, to raise and have decided the question of how and by what title the corporation holds the property—whether as real owner or as trustee—here too of necessity the question of title when settled, necessarily binds the corporation and the stockholders.

Who the *cestuis que trustent* are can make no difference, for the court will have before it all persons who

through the corporation claim the property, whether they be stockholders or other persons.

The decision of the question, Did the Northern Securities Company hold these stocks as the owner or as trustee for A. B. C., of necessity raised the question of what the trust was and who are the *cestuis que trustent*, and that A. B. C. turn out to be not only the *cestuis que trustent* of the corporation, but also its stockholders, can make no difference. In both respects the judgment concludes all the stockholders and all persons claiming through the corporation as trustee of the stocks.

As it happens all the assignors of the Northern Pacific and Great Northern stocks are also stockholders of the Northern Securities Company, and hence are doubly bound by this decree.

In the case at bar the stockholders of the Northern Securities Company are all concluded, because the Northern Securities Company for them set up that it was the lawful *bona fide* owner of the stocks, and the Court held it was not, and here the question was a corporate one and within the scope of the power of the corporation.

But as the issues raised by the pleadings distinctly and emphatically raised as part of the one question, whether the Northern Securities Company was or was not the Trustee or Custodian of the stocks for A. B. C. who originally assigned the stocks and became stockholders of the Northern Securities Company, the decision of the Court that the Northern Securities Company was the mere Trustee of A. B. C. who were also stockholders of the Northern Securities Company, was equally conclusive and binding on all the stockholders of the Northern Securities Company, because the case distinctly raised that issue, and on it the stockholders were represented by the Northern Securities Company.

The corporation under the pleadings which distinctly charged it was a mere trustee, represented not only all its stockholders as such, but all its *cestuis que trustent*. As to

such *cestuis que trustent* it, as representing all its stockholders, denied in the pleadings the *cestuis que trustent* title, and thus was in hostility to the *cestuis que trustent* as such, though representing them as stockholders of the corporation aside from their trust relation to them.

The Northern Securities Company in the Government suit was defendant in two aspects:

(a) As a corporation representing its stockholders; and,

(b) As a corporation trustee, as charged in paragraph XI of the Bill.

Harriman and others, the original assignors of Northern Pacific stock, were also in two relations to the corporation:

(a) As stockholders in the corporation;

(b) As *cestuis que trustent* of the corporation.

The decree against the corporation that it was a trustee is not only a personal decree against it individually, but also against it as Trustee.

So far as the present case is concerned, it is unnecessary to prove that the Northern Securities Company was in court as trustee as well as individually, for that it was in court individually is certain. It is so charged in the Bill and it so answers. It now still so avers. As all the *cestuis que trustent* of the Northern Pacific and Great Northern stocks were also its stockholders, and became such by virtue of the certificates it issued to them, and which were based on, and really issued for, the Northern Pacific and Great Northern stocks, the judgment against the corporation binds them as stockholders, and as the decree was that it did not own ,but was custodian of the stocks, that is conclusively settled. The stockholders through the corporation denied the trust rela-

tion, and the Court decided against them, and in this respect undoubtedly the corporation represented them, and they through the corporation were in court, and therefore bound by the decree.

No one of the stockholders or *cestuis que trustent* of the Northern Securities could, after the Government case, maintain as against the Company that the Company really owned the Northern Pacific stock, because the Supreme Court on the issue joined found and decreed it did not so own it.

When one set of those stockholders, who also happen to be *cestuis que trustent* of the corporation, on a bill filed against the corporation, set up that the corporation holds a certain portion of the Northern Pacific stock as their trustee, the corporation cannot deny it, because in the Government case where the corporation represented its stockholders and its *cestuis que trustent*, the Court decreed that it did so hold.

Hence, we also clearly see that the latter portion of the qualification as to the extent to which the Northern Securities Company represented its stockholders like the first two is at least misleading.

This qualification is—

> "but not in regard to anything which might be the subject of claim by the plaintiffs herein, or any of them adversely to this defendant or its other stockholders."

This is not a correct statement of the rule.

A corporation always is a *trustee* for all its stockholders of all the property it owns, and this is a *trust* which arises solely from the relations between the corporation and its stockholders.

> "It is a trust fund held by the Corporation as a trustee. * * * The shares of the capital stock are usually represented by certificates. Every holder is a *cestui que trust* to the extent of his ownership."

Farrington vs. Tennessee, 95 U. S. 686.

Now in one sense the claim of each stockholder as a *cestui que trust* is adverse to the corporation, his trustee, or at least it may be so—certainly will be so if the trustee denies his title or misuses the property.

But still using our former illustration of the litigation between A. B. and the Corporation which raises the question whether A. B. or the Corporation owns certain land or certain personal property, the decision, as we have seen, is conclusive on the Corporation as well as on the stockholder. If the decree be that the Corporation owns it, then as between the Corporation and the stockholder the relation of trustee and *cestui que trust* is raised, and if the Corporation afterwards seeks to deny that it, the Corporation, owns the property, the stockholder may plead as conclusive against the Corporation the above decree.

Equally, if the decree is that the Corporation does not own the property, this is also conclusive on the stockholder, and if he afterwards attempts to charge the Corporation as the owner, the decree would be conclusive against him.

So we see that the question of what the future respective positions of the Corporation and the stockholder may be does not at all affect the proposition that where the question is,—Does the Corporation own certain property?—the decree in the case binds conclusively both.

The defendant's view that where among the stockholders there may be different classes hoping for different results and having different views as to the nature of the title to the property which stands in the name of the Northern Securities Company, *there* the decree finding the facts on the original controversy is not conclusive on all these stockholders, is novel but not sound.

On the question of what title the corporation has to the stocks, it necessarily represents all its stockholders, (even if among them there be rival hopes as to the nature of the title,) for that is a corporate matter. If in such case the Northern Securities Company did not represent all its stockholders, then the decree left such stockholders free to again litigate, even with the United States, the same question. This no one will claim, and yet if it is not so, how can one say that the same question may be litigated between the defendants themselves which includes the stockholders?

If the rival claims of the stockholders were not *as* stockholders but as distinct and independent personalities, depending on claims to the property, which did not arise through the corporation or under its title, or by reason of its holding the stocks, there might be some justification for so claiming, but such a case does not arise on this record.

In the case at bar we are the *cestuis que trustent* of the Northern Securities Co. and as such *cestuis que trustent* we are the real owners of this Northern Pacific stock.

Our title to that stock grows out of our original ownership of the same. We made the Northern Securities Co. our trustee or custodian of it.

We however do claim in addition that as stockholders as well as *cestuis que trustent*, we can set up the Supreme Court decree as conclusive in this case between ourselves and the Northern Securities Co. as to the nature of the title the Northern Securities Co. has to the stock.

In the Government case the Northern Securities Company for the complainants and all its other stockholders, denied it was a mere trustee or custodian for the Northern Pacific stocks, and set up that it really owned them.

The Court held that it did not own, but held them as trustee or custodian, and the mere fact that Harriman, one of the stockholders, was also a *cestui que trust*, under the trust so found, cannot restrict or destroy the binding effect of the decree. Assume for arguments sake

(which we deny), that as between all the Northern Securities Company stockholders it is conclusive, not of who were the certain *cestuis que trustent*, but only of the fact that the corporation was not the bona fide owner, but trustee, and it still remains to find out who the *cestuis que trustent* are, the result in this case is the same. We prove that we are the *cestuis que trustent* in other and conclusive ways.

The Northern Securities Company in the Government case was in Court not only as a corporation, representing as such all its stockholders, but in addition as trustee, as we have before seen, and the present plaintiffs were in Court as stockholders and as *cestuis que trustent*, and they were represented in each capacity by the Corporation.

Indeed even where one is a party only in one capacity yet if his interests in both capacities are before the court, the decree will bind him in both and can be pleaded in both. If this Court in the Government case had before it the rights of the Northern Securities Co. as our trustee, and also of the Securities Co. as a corporation representing us as stockholders, the decree would conclude us and could be used by us in both capacities.

Black on Judgments, Sec. 536.
Corcoran vs. Chesapeake Canal Co., 94 U. S., 741.

As certui que trust of the Northern Securities Co. under the charge in paragraph XI. of the Bill.

In *McElrath vs. P. & S. R. Co.*, 68 Pa. 40, on a proceeding to foreclose a mortgage which was given to a trustee to secure the bondholders, the Court *inter alia* said:

"Hence the trustee is the party to be summoned to defend the interests of those who claim under the mortgage. The bondholders are privies in interest and may come in to defend *pro interesse suo*, but their rights are effected by the decree against their trustees. Chapman, therefore,as a holder of the bonds of the second mortgage, is not a stranger claiming collaterally but must come in under the mortgage. He does not stand in the attitude of another creditor claiming a right to attack the decree or judgment of an opposing creditor upon the ground of collusion or fraud between the plaintiff and defendant in the judgment, but he is affected by the decree itself against his own trustee."

Shaw vs. Railroad Company, 105 U. S. 605.

"The trustee (in a mortgage) is in court for and on behalf of the beneficiaries; and they, though not parties, are bound by the judgment unless it is impeached for fraud or collusion between him and the adverse party."

Kerrison, Assignee, vs. Stewart, 93 U. S. 160.
Vetterlein. vs. Barnes, 124 U. S. 169.
Beals vs. Railway Co., 133 U. S. 290.
Kent vs. Lake Superior Co., 144 U. S. 90.
Manson vsD. uncannon, 166 U. S. 542.

(b) *One of a class represented by Morgan-Hill and others.*

In Paragraph II of the Government Bill the charge is against the defendants named,

> "And certain other persons who are unknown to the Complainant but whom it prays to have made parties to this action when hereinafter ascertained, hereinafter referred to as James J. Hill and his associate stockholders."
>
> (As to Great Northern.)
>
> "And certain other persons whose names are unknown to the Complainant but whom it prays to have made parties to this action when ascertained (hereinafter referred to as J. Pierpont Morgan and his associate stockholders.")
>
> (As to Northern Pacific.)

It is a well recognized rule, forming indeed an exception to the general rule in courts of equity, that several representative persons may be selected to represent a class, and that a decree against those persons binds the entire class, though the other members of the class were not actually in court or formally made parties to the litigation.

The class in this case was a combination formed by the stockholders of the two constituent railroad companies to restrict trade and commerce:

Morgan, Hill and the other stockholders named were the representatives of the class:

The appellants, as the owners of the Northern Pacific stock in dispute which they assigned to the Northern Securities Company, were members of the class:

They are, therefore, bound by the decree and consequently may enforce the decree in any subsequent litigation

with any other person who was a party to the Government Case including the Northern Securities Company.

The practice of the Government in thus naming part of the class to represent and bind the whole, was based upon the settled practice in equity recognized by the Supreme Court in the case of *Smith vs. Swormstedt*, 16 How. 288, sec. 303, where Mr. Justice Nelson, among other things, said:

> "In all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried. Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject matter of the suit is common to all, there can be very little danger but that the interests of all will be properly protected and maintained."

The reasoning in the familiar cases of litigation by or against property owners affected by special taxes or assessments is also pertinent to the question now before the court.

In *McIntosh vs. City of Pittsburg*, 112 Fed. Rep, 705, 707, Buffington D. J., among other things, said:

> "It is clear the interests of the present complainant and that of the appellants in the common pleas case

were identical. It was one common to both as members of a class. Where such common interest exists, one or more of a class may litigate such interest without making all class members parties. Story on Equity Pleadings, cited in *Smith vs. Swormstedt*, 16 How. 302. Such facts constitute an exception to the general rule in courts of equity that all persons in interest must be parties to a bill, and where *bona fide* bills are filed and litigated by representatives of a class, and the subject matter of a suit is common to all, the decree binds the entire class as fully as if all were before the court. *Smith vs. Swormstedt, supra.* This well settled principle of equity procedure has been applied in municipal litigation. A judgment against a municipality or its legal representatives in a matter of general interest to all its inhabitants—for example, respecting the levy and collection of a tax—is conclusive not only upon the municipal defendant, but upon all its inhabitants, though not made parties. Such inhabitant cannot collaterally attack such judgment, or re-litigate the subject matter. *Sauls vs. Freeman*, 24 Fla. 222; *Clark vs. Wolf*, 29 Iowa 197; *Gaskill vs. Dudley*, 6 Metc.(Mass.) 546: *Terry vs. Town of Waterbury*, 35 Conn. 526; *Cromwell vs. County of Sac.*, 94 U. S. 351; *Lyman vs. Faris*, 53 Iowa 498; *Ashton vs. City of Rochester*, 133 N. Y. 193."

Willoughby vs. Chicago R. R. Co., 50 New Jersey 609.

(c). As a stockholder in the Northern Pacific Railway Company—

The appellants always were, as found by this court, the equitable owners of the Northern Pacific stock here in dis-

pute. They therefore were stockholders of the Northern Pacific Railroad Company, and as that Company was a party to the Government Case and was concluded by the finding and decree in that case, the appellants as stockholders were; and hence appellants may use these findings and decree as conclusive in any subsequent litigation between parties who were parties to that suit:

VII.

We are in this case entitled to set up and plead as res adjudicata the findings, conclusions and decree of this court in the Government Case as hereinbefore enumerated, even if the cause of action in the Government Case was differenl from the cause of action in the present case.

BECAUSE—

(a). The present case is a sequence of and from the Government Case. This case would not have arisen unless the Government Case had been decided. The two cases are closely connected and related.

(b). The parties in the present case were parties in the Government Case and in the same capacity.

(c) The subject matter in the Government Case included the identical subject matter in the present case, being the 717,320 shares of the Northern Pacific stock involved in this case.

(d) Among the issues involved in the Government Case was the identical issue involved in the present case, *i. e.*, the lawful, absolute ownership by the Northern Securities Company of the Northern Pacific stock in dispute. The mere fact that in the Government Case there may have been other issues is not material, because the issue in this case was also in the Government Case, and this issue in the present case was also in the Government Case.

Especially did this court have before it in the Government Case both questions as to the Northern Securities Company, i. e:

(a) Did it become the lawful purchaser and lawful owner of the stock; or,

(b) Merely its custodian or trustee for the original assignors of the same, holding it for an illegal purpose.

(e) The issue in this case was distinctly raised by the pleadings and decided in the Government Case.

(f) The issue in the present case was a material issue in the Government Case. Indeed it was *the* question upon which this Court divided.

This is put with the qualification that while the materiality of the issue in the Government Case is undoubted, and we therefore for the sake of argument concede it, yet as a fact, under the decisions of this court, it does not seem to be necessary that the issue should be material in the prior case, if the issue was formally made by the pleadings and the court decided the question in the prior case.

(See *Railroad Co. vs. Schutte*, 103 U. S. 143).

Let us prove each of these propositions:

(a) That the decision in the Government Case caused the present litigation is beyond doubt. This case is the child of that parent.

(b) *The parties to the present case, the appellants and the Northern Securities Company, were parties to the Government Case, and in the same capacity.*

The Northern Securities Company was a party to the Government Case and appeared and answered and defended the litigation. In doing so it appeared and defended the litigation for and on behalf of its stockholders and each one of the stockholders was thereupon a party to the Government Case through and by reason of the Northern Securities Company, who represented them. Each one of the stockholders was a privy to the Northern Securities Company, for the Northern Securities Company, as to all the property it owned absolutely or otherwise, held that property for its stockholders, and there was

a privity of estate between them as well as a privity by representation that existed between the stockholder and the corporation.

But in that Government Case the bill charged (paragraph XI) that the Northern Securities Company acquired possession of the stocks as the trustee or custodian or agent for the original railroad stockholders of the two constituent companies, and that this trusteeship and custodianship and agency arose out of the relations between the original railroad stockholders, and as a consequence of their actions, with the Northern Securities Company. This was charging the Northern Securities Company, a party actually in court, as a trustee,and the Northern Securities Company in that capacity represented its *cestuis que trustent*. Now the *cestuisque trustent* of the Northern Securities Company were the identical persons (or their assigns) who were also the original stockholders of the two constituent railroad companies, who had assigned their stock to the Northern Securities Company.

The same individuals then were represented by the Northern Securities Company in the Government case in two capacities, to-wit: in the capacity of a stockholder and in the capacity of *cestui que trust*.

When an individual brings an action in a court of justice he centers in himself all the right and all the title and all the claim which he has to relief in reference to the thing in dispute, and this entirely irrespective of the question as to the manner in which he acquired his different rights and claim and title. For example: if he claims title to personal property, it is entirely indifferent whether he got it by will or by deed or by gift or by purchase or by all combined, provided he owns it. So also, if he has any right or title as to the thing in dispute which arises by reason of his former relations to the other party to the litigation, such as between the stockholder and the corporation, he has just as much right to assert the title or right thus acquired as a

stockholder as he had to assert title or right acquired by will or gift or purchase; and therefore, in the present suit the appellants are entitled to assert the rights that come to them by reason of the fact that they were stockholders of the Northern Securities Company, just as certainly and as fully as if they were asserting a right which came to them by purchase.

A stockholder's rights are rights to him individually.

We were also represented in the Government suit as one of a class, the class being the original railroad stockholders of the two constituent companies, to wit, Messrs. Morgan, Hill, Clough and others. We were of the class with them, and they were sued in their representative capacity as a class. We were therefore through them parties to the litigation. The class was those who composed the combination, no matter at what time they had joined it,—whether they were the originators or whether they joined afterwards in carrying it out.

We were also represented in the Government suit as stockholders of the Northern Pacific Railroad Company, who was a party to, and appeared in, the Government suit, and was concluded by the decree in that suit. While our stock had been assigned to the Northern Securities Company, who appeared of record as a stockholder of the Northern Pacific, as a fact the Northern Securities Company was our trustee, and we were therefore represented by the Northern Pacific Railroad Company, who represented all its stockholders, notwithstanding their title may have been merely equitable.

In our present suit we include all our rights in the Government litigation, however we gained them.

(c) *The subject matter of the present litigation is 717,320 shares of the capital stock of the Northern Pacific Railroad Company, and this identical capital stock was the stock which the complainants assigned to the Northern Securities Company for the purpose of carrying out the combination.*

See in proof of this *infra*—pages 118–127 of this brief.

The appellants assigned to the Northern Securities Company 370,230 shares common stock of the Northern Pacific Railroad Company and 410,850 shares preferred stock, with the agreement between the appellants and the Northern Securities Company that the Northern Securities Company would convert the preferred stock into common stock of the Northern Pacific, which was done, and this common stock the Northern Securities Company holds to-day as the equivalent of, and the thing into which the preferred stock was changed by agreement. It is plainly ear-marked. In equity it is practically the same as the preferred stock we assigned. Even if there had been no agreement and the preferred stock had merely been converted by the Northern Securities Company and the Northern Pacific, it was merely changing the class of the stock. Both the preferred and the common stock were still stock of the Northern Pacific Railroad Company, and that the Northern Securities Company saw fit to change the classification by surrendering the preferred and taking out the common, did not change the real identity of the stock.

Judge Dallas said:

"The present suit is an independent one and as its *subject matter* is distinctly different from that of the suit in which the United States was complainant the duty of this Court to independently consider it has seemed to us to be both plain and imperative."

Let us test the correctness of this:

What is the subject matter of a suit?

Evidently the subject about which the suit is brought.

If there is a distinction between the "cause of action" and the "subject matter" of a suit, possibly the "cause of action" may be defined as—the injury done to the plaintiff which he resents and for which he seeks relief, and the "subject matter" is the property or thing concerning which the relief is sought.

If we follow up the supposed distinction, the cause of action in the Government Case was the injury resulting to trade and commerce by the Securities Company holding the stocks in both railroad companies, while the cause of action in this case is the injury resulting to appellants by the holding by the Northern Securities Company of a part of said identical stocks.

The difference is that the Government Case included the entire holding of the Securities Co. in both railroad companies. While in this case is involved only our Northern Pacific stock which was a part of the whole involved in the Government Case.

It is, however, believed that the subject matter and the cause of action are interchangeable and denote the same thing.

Anderson's Law Dictionary,—Title, *Subject Matter.*

It will thus be seen that the cause of action in the Government Case embraced as an essential step in the combination, the acquisition and holding of our Northern Pacific

stock, and *that* acquisition and holding was one of the things which made the combination and therefore a part, and a most important part, of the thing which caused the injury to the Government for which it sought relief. The possession of our stocks by the Securities was necessary to give it control of the Northern Pacific Co. It was a part of the combination. It, with other parts, made up the combination.

What is the subject matter of the two suits—the Government and the present suit?

The thing about which the Government suit was brought was the holding of the railroad stocks by the Securities Company and thus give control of the two railroad companies and eliminate competition. This combination was made up of parts and steps and acts:

One of the parts was the organization of the Northern Securities Company as a holding corporation and an instrument of the combination:

Another of the parts was the acquisition and holding by the Northern Securities Company of the railroad stocks, including the Northern Pacific stock in dispute.

Such organization of the corporation, its acquisition and holding of the stocks, each parts of the combination and indispensable to its success, and, indeed, the main feature of it.

When the case came to this court, you emphasized that, because you considered at length as the questions most material and controlling:

By whom and for what purpose had the Northern Securities Company been formed?

How and for what purpose had it acquired the railroad stocks, including appellants'?

How and for what purpose did it hold such stocks?

Was it a mere ordinary case of a corporation organized for a lawful purpose and lawfully purchasing railroad stocks, or was it the case of a corporation organized for an illegal purpose, illegally acquiring and illegally holding for such illegal purposes such railroad stocks.

At least five of the members of this Court refused to commit themselves on what the consequences would be if the Securities Co. was the lawful purchaser and lawful owner of the railroad stocks.

Four dissented because the question of ownership of the stocks by the Securities Co. being the material question in the case the Act of Congress had not power to regulate that—that belonged wholly to the States and not to Congress.

This Court held that the Securities Company did not hold as such lawful purchaser and lawful owner, but that it illegally acquired and illegally held for an illegal purpose such stocks, and merely as custodian for the assignors.

This illegal acquisition and holding of the railroad stocks then was THE thing which in this court was an essential and controlling part of the illegal combination, and to succeed in the Government Case the United States had to prove that the acquisition and holding of said stock was each illegal and for an illegal purpose.

Now, to say, as the Court of Appeals did (Judge Dallas), that the *subject matter* in the Government case and in the present case were entirely different and independent, when the proof of the illegal acquisition and illegal holding of such railroad stocks, including our Northern Pacific stock, for an illegal purpose was a condition precedent to the success of the United States in that case, and when it was the very point upon which the case in this court turned, is, we hasten to admit, wholly incomprehensible to us.

(e f) That the issues in this case were raised and were material, and were decided in the Government Case we have hereinbefore proven and hereinafter consider.

VIII.

The averments of the bill and answers in the Government Case distinctly raised, inter alia, as material questions upon which the controversy turned, the following, which are in substance, the same hereinbefore stated, (pages 3, 4) *but now re-stated in somewhat different form.*

(a) Did Morgan, Hill and other stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, two parallel and competing lines of railroad, engaged in inter-state commerce, enter into an unlawful combination to effect a virtual consolidation of the two railroads, contrary to the provisions of the Sherman Act?

(b) Was the organization of the Northern Securities Company planned by Morgan, Hill *et. al.* as a holding company in whose possession a control of the stocks of said railroad companies was to be placed, and solely as an instrumentality through, and by means of which, their combination in restraint of trade and commerce was to be carried out?

(c) Was the Northern Securities Company actually organized by Hill, Morgan and others solely as an instrument under the control of Hill, Morgan and others to effect the unlawful purposes of the combination?

(d) After such organization of the Securities Company, was the larger part of the capital stock of the Great Northern and Northern Pacific Railroad Companies (including complainants') assigned to said Securities Company in exchange for the stock of the Securities Co. at par and in furtherance and in pursuance of, and to make effective the unlawful combination aforesaid?

(e) Did the Securities Company by such assignment of said railroad stocks to it become the lawful purchaser and lawful, absolute owner, with right to sell, of said stocks, or did it become the mere custodian, depositary, holder and trustee of the same for the origina stockholders in said two constituent railroad companies?

At least this court evidently thought that all said questions did arise in the Government Case, else why did the opinions of Mr. Justice Harlan, Brewer and White discuss them?

Why was the decision put by the majority of the court expressly on the ground that the Northern Securities Company was *not* the real, substantial owner of the stock, but its mere custodian for the original stockholders in the two railroad companies?

That it was so put, our quotation from the opinion of the court, by Mr. Justice Harlan, *supra*, demonstrates.

Not only that, but he declined to discuss what the consequences would be if the Northern Securities Company was the real, substantial owner—saying that the question was not in the case *because* the Securities Company was not such owner.

It is true that all of our questions as propositions center in, and lead up to, and in one sense make a part of, the last one, which, put as a proposition, is—

> That the Northern Securities Company was not the lawful purchaser and lawful, absolute owner of said railroad stocks, but held them as custodian for the individuals who formed the combination.

Mr. Justice Brewer, after asserting the right of an individual to buy the majority of the stock of each of the two railroad companies, said:
P. 362.

> "But no such investment by a single individual of his means is here presented. There was a combination by several individuals separately owning stock in two competing railroad companies to place the control of both in a single corporation. The purpose to combine, and by combination destroy competition, existed before the organization of the corporation, the Securities Company. That corporation, though nominally having a capital stock of $400,000,000, had no means of its own; $30,000 in cash was put into its treasury, but simply for the expenses of organization. The organizers might just as well have made the nominal stock a thousand millions as four hundred, and the corporation would have been no richer or poorer. A corporation, while by fiction of law recognized for some purposes as a person and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. In this case it was a mere instrumentality by which separate railroad properties were combined under one control. That combination is as direct a restraint of trade by destroying competition as the appointment of a committee

to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. The transfer of stock to the Securities Company was a mere incident, the manner in which the combination to destroy competition and thus unlawfully restrain trade was carried out.

"If the parties interested in these two railroad companies can, through the instrumentality of a *holding* corporation, place both under one control, then in like manner, as was conceded on the argument by one of the counsel for the appellants, could the control of all the railroad companies in the country be placed in a single corporation."

He thus explicitly states that the transfer of the stocks to the Securities Co. was

"the *manner* in which the *unlawful* combination to de-
"stroy competition and thus unlawfully restrain trade
"was carried out."

That the Securities Co.

"was a *mere instrumentality* by which separate railroad properties were combined under one control."

That the question was not one of

"*investment* by a single individual."

Mr. Justice White evidently thought that the question of whether the Northern Securities Company was the real owner of the stock was material in the case, for he dissented on the express ground that Congress could not

"regulate the acquisition and ownership of the stock in question by the Northern Securities Co."

Among other things he said:

P. 365.

"The Government, by its bill, *challenges* the right of the Northern Securities Company to *hold* and *own* the stock in the two railroads."

Again he said:

P. 366.

"Two questions arise: Does the Anti-Trust Act, when rightly interpreted, apply to the acquisition and ownership of the stock in the two railroads, and, second, if it does, had Congress the power to regulate or control such acquisition and ownership?"

Again on the same page he said:

"It is said first, that the mere exchange by the Northern Securities Company of its stock for stock in the railroads did not make the Northern Securities Company the *real owner* of the stock in the railroads since the effect of the transaction was to cause the Securities Company to become merely the *custodian* or *trustee* of the stock in the railroads."

P. 400.

"Being of the opinion for the reasons heretofore "given that Congress was without power *to regulate the* "*acquisition and ownership* of the stock in question by "the Northern Securities Company, and because I think "even if there were such power in Congress it has not "been exercised by the Anti-Trust Act as is shown in "the opinion of Mr. Justice Holmes, I dissent.

"I am authorized to say that the Chief Justice, Mr. "Justice Peckham, and Mr. Justice Holmes concur in this dissent."

Averments of the Bill in the Government Case.

The bill was by the United States as complainant and against the Northern Securities Company, the Great Northern Railway Company,—The Northern Pacific Railway Company,—Hill—Clough—James—Kennedy—Morgan—Bacon—Baker and Lamont as defendants.

"and certain other persons whose names are un-
"known to the complainant but whom it prays to have
"made parties when ascertained, hereinafter referred
"to as J. Pierpont Morgan and his associate stock-
"holders."

Briefly epitomized it alleged as follows:

(I) That the Northern Pacific and Great Northern Railway Companies were common carriers engaged in inter-state commerce:

(II) The individual defendants on and prior to November 13th, 1901, owned or controlled a majority of the stocks of the Northern Pacific and Great Northern Railway Companies; the Hill people the Great Northern, the Morgan people, the Northern Pacific:

(III) Gives the routes of the Great Northern and the Northern Pacific Railways and alleges they were on and prior to November 13th, 1901, two independent and competing lines engaged in inter-state commerce:

(IV) Gives history of the Northern Pacific insolvency in 1893 and the attempted consolidation with the Great Northern described and ruled on in *Pearsall vs. The Great Northern Railway Company*, 161 U. S. 646:

(V) The purchase in 1901 by the Great Northern and the Northern Pacific Railway Companies of the Chicago, Burlington & Quincy Railway Company, and the effect of the same;

(VI) After the attempt in the Pearsall case to turn over control of the Northern Pacific Railway Company to the Great Northern was defeated, Hill and his associates

owning or controlling Great Northern, and Morgan and his associates owning the Northern Pacific Railway Company stock

"contriving and intending unlawfully to restrain the trade or commerce among the several States * * * and * * * unlawfully to monopolize or attempt to monopolize such trade * * * entered into an unlawful combination or conspiracy to effect a virtual consolidation of the Northern Pacific and Great Northern systems, and to place restraint upon all competitive inter-state and foreign trade or commerce carried on by them * * * through the instrumentality and by the means following, to wit: A holding corporation to be called the Northern Securities Company was to be formed under the laws of New Jersey with a capital stock of $400,000,000,—to which in exchange for its own capital stock upon a certain basis and at a certain rate was to be turned over and transferred the capital stock or a controlling interest in the capital stock of each of the defendant railway companies with power in the holding corporation to vote such stock and in all respects to act as the owner thereof, and to do whatever it might deem necessary to aid in any manner such railway companies or enhance the value of their stocks,

(VII) "In *pursuance of the unlawful combination* or conspiracy aforesaid, and solely as an instrumentality through which to effect the purposes thereof, on the 13th day of November 1901, the defendant, the Northern Securities Company, was organized under the general laws of the State of New Jersey, with its principal office in Hoboken, in said State, and with an authorized capital stock of $400,000,000. A copy of the articles of incorporation of such company is attached to and made a part of this petition. Among the purposes and powers designedly inserted in said articles is the pur-

pose and power, not only 'to purchase' and 'hold' 'shares' of the capital stock of any other corporation or corporations, under which said company wrongfully claims and is exercising the power to acquire by exchange and hold the stock of the Northern Pacific and the Great Northern Railway Companies, but the purpose and power, while owner thereof, 'to exercise all the rights, powers, and privileges of ownership;' that is, to vote such stock, collect the dividends thereon, and in all respects act as a stockholder of such railway companies; and the purpose and power 'to aid in any manner any corporation * * * of which any bonds * * * or stock are held * * * and to do any acts or things designed to protect, preserve, improve, or enhance the value of any such bonds * * * or stock,' meaning thereby to do whatever it may deem necessary to aid in any manner the Northern Pacific and the Great Northern Railway Companies, or to preserve or enhance the value of their stocks or bonds."

(VIII) "In further pursuance of the unlawful combination or conspiracy aforesaid *and solely as an instrumentality through which to effect the purpose thereof*, on or about the 14th day of November, 1901, the defendant, the Northern Securities Company was organized by the election of a board of directors."

Hill and Morgan assigned capital stock of the Great Northern and Northern Pacific to it at certain valuation:

"In further pursuance of the unlawful combination or conspiracy aforesaid * * * the Northern Securities Company has acquired an *additional amount*

of the stock of the defendant railway companies issuing in lieu thereof its own stock upon the basis of exchange aforesaid, and is now holding as owner and proprietor substantially all of the capital stock of the * * * (Great Northern and Northern Pacific Railway Companies) and is voting the same and is collecting the dividends thereon, and in all respects is acting as the owner thereof. * * * By reason whereof a virtual consolidation under one ownership and source of control (of the two systems) * * * has been effected."

The conspiracy has, through the Northern Securies Co., gained control, and is in actual operation, restraining trade and commerce contrary to the Sherman Act.

(IX) If the Northern Securities Company has not formally acquired a majority of the stock of the Northern Pacific and Great Northern Railway Companies, it is a mere device whereby part is withheld by the conspirators.

(X) Unless restrained by injunction the Northern Securities Company will secure all the stocks of the Northern Pacific and the Great Northern Railway Companies.

(XI) "*No consideration whatever has existed, or* will exist, for the transfer as aforesaid of the stock of the defendant railway companies from their stockholders to the Northern Securities Company other than the issue of the stock of the Northern Securities Company to them in exchange thereof for the purpose, after the manner and upon the basis aforesaid.

"*The defendant, the Northern Securities Company, was not organized in good faith to purchase and pay for the stocks of the Great Northern and the Northern Pacific Railway Companies. It was or-*

ganized solely to incorporate the pooling of the stocks of said companies and to carry into effect the unlawful combination or conspiracy aforesaid. The Northern Securities Company is a mere depository, custodian, holder and trustee of the stocks of the Great Northern and the Northern Pacific Railway Companies, and its shares of stock are but beneficial certificates issued against said railroad stocks to designate the interest of the holders in the pool."

(XII) "If the Government fails to prevent the carrying out of the combination or conspiracy aforesaid, and the defendant, the Northern Securities Company, is permitted to receive and hold and *act as the owner* of the stock of the Northern Pacific and the Great Northern Railway Companies, as aforesaid, not only will a virtual consolidation of two competing transcontinental lines with the practical pooling of their earnings be effected, * * *"

but a system will be devised by which in the future all the railroads of the United States may be merged into one control.

(XIII)—The defendants named have combined with one another and with other persons to use various other schemes and devices to carry out the conspiracy.

Prayers.

Prays the Court:

"to order, adjudge and decree that the combination or conspiracy hereinbefore described is unlawful, and that *all acts done in* carrying it out are in derogation of the common rights of all the people of the United States, and in violation of the Act of Congress of July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies.' "

And that the defendants may be enjoined from carrying it out.

FIRST. That the Northern Securities Company and its officers, stockholders and directors

"be perpetually enjoined from purchasing, acquiring, receiving, holding, voting, (whether by proxy or otherwise) or in any manner acting as the owner of any of the shares of the capital stock of either the Northern Pacific Railway Company or the Great Northern Railway Company; and that a mandatory injunction may issue requiring the Northern Securities Company to recall and cancel any certificate of stock issued by it in purchase of or in exchange for any of the shares of the capital stock of either of said railway companies, surrendering in return therefor to the holders thereof the certificates of stock in the respective railway companies in lieu of which they were issued."

SECOND. That the Northern Pacific Railway Company be enjoined from recognizing the Northern Securities Company as a stockholder or allowing it to vote.

THIRD. That the Great Northern be likewise restrained.

"FOURTH. That the individual defendants named and their associate stockholders, and each and every stockholder of either of said railway companies who has exchanged his stock therein for the stock of the Northern Securities Company, be each respectively perpetually enjoined from in any manner voting, holding or acting as the owner of any of the stock of the Northern Securities Company issued in exchange for the stock of either of the said railway companies unless authorized by this court; and that a mandatory injunction may issue requiring each of the said defendants to surrender any stock of the Northern Securities Company so acquired and held by him, and accept therefor the stock of the defendant railway company in exchange for which the same was issued."

FIFTH. To restrain all the defendants "and their associate stockholders" from any further combination or conspiracy.

Prayer for general relief.

Answer of Defendants.

The answers of all the defendants were in substance the same. Briefly epitomized the answer of the Northern Securities Company, was as follows:

Denied conspiracy,—alleged that Hill and others, holders of Great Northern stock, organized the Northern Securities Company, but not Morgan or Bacon; admits transfer to Northern Securities Company of majority of Northern Pacific Railway stock and a large interest in Great Northern stock, but denies that it was done in pursuance of a conspiracy.

Its answers to Paragraph XI of Complainant's Bill, which paragraph directly and distinctly charged that the Northern Securities Company held the stocks of the Northern Pacific and the Great Northern Railway Companies merely as custodian and trustee for the conspirators and to carry out the conspiracy, and not as the real owner thereof, was as follows:

> "This defendant says it has *bought and paid for* and has caused to be transferred to it upon the records of the Great Northern Company, in accordance with the by-laws of that company, about five-twelfths (5-12) of the shares of that company's stock and has also negotiated for, but has not yet caused to be presented to the Great Northern Company for transfer upon its records, other shares of the stock of that company aggregating about four-twelfths (4-12) of the total amount of its stock, but has not acquired a right to vote as stockholder of the Great Northern Company on stock not so transferred. This defendant in acquiring shares of the Great Northern Company and of the Northern Pacific Company, dealt solely with the separate owners of the said shares in their respective individual capacities. It has no knowledge of any agreement, promise or understanding between any of the holders of said stock con-

cerning the sale thereof to it, and it denies that any such agreement, promise or understanding was ever made. *All the sales and transfers of said stock to this defendant were absolute and without any reservation of any right or interest in any share thereof to the seller or to any other person.*"

"This defendant has not paid for all the stock of the Great Northern Company and of the Northern Pacific Company acquired by it in shares of its own stock, but, on the contrary, has expended upward of Forty millions ($40,000,000) Dollars cash in the making of such purchase. Every share of the Great Northern Company and the Northern Pacific Company acquired by this defendant has been, and so long as it remains the property of this defendant will continue to be, held and owned by it in its own right, and not under any agreement, promise or understanding on its part, or on the part of its stockholders or officers, that the same shall be held, owned or kept by it for any period of time whatever, or under any agreement that in any manner restricts its right and power immediately to sell or otherwise dispose of the same, or that restricts or controls to any extent any use of the same, which might lawfully be exercised by any other owner of said stocks. *There has been and is no agreement, promise or understanding between any of the holders of said stock so acquired by this defendant, or between any* of them and any other person or corporation, that any of said *shares should at any time be held, used or voted* by *this defendant* for the purpose of *combining or consolidating or placing under one common management* or control the railways of the Great Northern Company and of the Northern Pacific Company, or the business thereof, or for the purpose of monopolizing or restraining traffic or competition between the said railways. Many stockholders of the said companies have not sold,

and may never sell, their shares to this defendant; and the said railway companies have not, nor have any of the directors of either of them, by any act, formal or informal, or by suggestion, ever solicited any of their respective shareholders to sell their shares to this defendant. This *defendant was organized in good faith*, and it denies all the allegations in sub-division XI. of the petition."

Paragraph V., part 2nd, of the answer of the Securities Co. is in these words:

"This defendant was not organized for the purpose of acquiring a majority of the stock of either the Great Northern or the Northern Pacific Company, but merely to purchase the stock of those who wished to sell, as above stated, and was not organized for the purpose of controlling railway rates in the slightest degree, and has not had and cannot have any such effect. The transactions referred to in the petition have consisted in the organizing of a lawful corporation and the purchase of property by it. All acts done in relation to the organization of this defendant and in the conduct of its business have been expressly authorized by law, and have had no effect whatever to restrain trade or commerce among the several States or with foreign nations. If these lawful transactions should hereafter have any effect to restrain trade or commerce among the several States or with foreign nations (which is hereby denied), that effect would be merely indirect, remote, incidental, and collateral, and not intended, and as nothing compared with the great expansion of the volume of interstate and international commerce which was intended, and which this defendant believes is destined to result from the enterprise of the two railway companies, that culminated in the purchase of the Burlington stock.

"And this defendant says:

"(1) The 'Anti-Trust act' was not intended to prevent or defeat an enterprise in aid of a great competitive inter-state and international commerce merely because such enterprise may carry with it the possibility of incidental restraint upon some commerce, trifling both as respects territory and volume.

"(2) Nor was the act intended to limit the power of the several States to create corporations, define their purposes, fix the amount of their capital, and determine who may buy, own and sell their stock.

"(3) Otherwise construed, the act would be unconstitutional, because:

"The power to regulate commerce with foreign nations among the States does not give Congress the power to regulate any of the matters above mentioned in respect to corporations created by the States; and because,

Persons may not be deprived of their property without due process of law, by taking from them the right to sell it as their interest may suggest."

ISSUES RAISED BY THE BILL AND ANSWER.

Here are all the issues raised hereinbefore stated and on which the present case turns.

See *Ante* pages 3, 4, 90, 91.

All of these issues really center in, and are parts of, and lead up to, the controlling question in the present case:

Was the Northern Securities Company the lawful purchaser and lawful, absolute owner of the railroad stocks, or was it the mere instrument of the combination to hold the stocks as custodian for the members of the combination?

If any one will but read these pleadings,—then your opinions—and then your decree,—is it possible he could be so misled as to say that you did not even "incidently" consider the above question of ownership, and (though the present case is an offshoot from the Government case, and an understanding of what you did is absolutely essential to understand this case) that it was his duty to decide the present case independently of, and as if the Government case had never arisen?

IX.

These stocks in the two railroad companies which, as averred in the Bill in the Government Case, and as found by this Court, were transferred by Hill, Morgan and other stockholders to the Northern Securities Company in pursuance of, and to perfect the illegal combination to restrain trade and commerce, included the stock owned by the Oregon Short Line Railroad Company and held in the name of Harriman and Pierce as Trustee, being the identical stock in controversy in this case.

The combination absolutely required a majority of the capital stock of the Northern Pacific Railway Company; such majority was indispensable to success, and without it the combination must fail, because it could not control the Northern Pacific Railroad Company.

Paragraph VIII of the Government Bill alleged that

> "in further pursuance of the unlawful combination or conspiracy aforesaid, and solely as an instrumentality through which to effect the purpose thereof"

the Northern Securities Company was organized, and

"in further pursuance of the unlawful combination or conspiracy aforesaid"

there was

"assigned and transferred to the defendant, the Northern Securities Company, a large majority of the capital stock of the defendant, the Northern Pacific Railway Company."

The Northern Securities Company admitted (See paragraph VIII of the Answer, Government Case) that it had acquired

"a majority of the stock of the Northern Pacific Com-Company."

The Answer of the Northern Securities Company in the Government Case, Part Second, Section 2, said that—

"But pending or just after the conclusion of the negotiations for the Burlington stock, parties acting in the interests of the Union Pacific Railway system did purchase Northern Pacific shares, both common and preferred to the amount of about seventy-eight million ($78,000,000.00) dollars, being a clear majority of the entire capital stock of that company."

In the same paragraph of the Answer, the Northern Securities Company further said:

"After its organization, this defendant bought and still holds about one hundred and fifty million dollars ($150,000,000.00) of the stock of the Northern Pacific Company."

Again in the same section it said :

"About May 1st. 1901, their (Hill and other Great Northern shareholders) aggregate holdings of the common stock of the Northern Pacific Company amounted to nearly twenty million dollars ($20,000,-

000.00) of the eighty million dollars ($80,000,000.00) common stock of the company, which also had a preferred stock amounting to seventy-five million dollars ($75,000,000.00), with the same voting power as the common stock."

The entire capital stock of the Northern Pacific was one hundred and fifty-five million ($155,000,000.00) dollars. (See answer of the Northern Securities Company, Part II, Section 2; Answer of James J. Hill, Part II, Section 2; Answer of J. P. Morgan, Paragraph 14 ; Answer of Daniel S. Lamont, Paragraph 14; Testimony of Jacob Schiff, p. 272).

Mr. Justice Harlan said that—

" Such holding corporation (Securities Company) has become the holder, more properly speaking, the custodian, of more than nine-tenths of the stock of the Northern Pacific."

It is perfectly evident that even to make a majority of the stock of the Northern Pacific, it required the Oregon Short Line stock, represented by Harriman and Pierce, which is the identical stock included in the present litigation:

That the present stock included in the present litigation was not only a part of the *majority* of the Northern Pacific stock, alleged in the bill and admitted in the answer in the Government case, but a part of the nine-tenths of the capital stock of the Northern Pacific Railroad Company spoken of by Mr. Justice Harlan in his opinion, is not denied in the present case, and was before this Court in the Government case, under the pleadings and testimony just cited, and also, as shown by the following additional extracts from the testimony before this Court in the Government case:

W. P. CLOUGH, then and now one of the directors of the Northern Securities Company, testified in the Government case as follows (pp. 657–658, Government Record):

"Q. Were all of these certificates paid for by the transfer of stock of the Northern Securities Company?

"A. No, sir.

"Q. What certificates were not?

"A. On the 18th day of November, 1901, the Northern Securities Company purchased $37,023,000. of the common stock and $41,085,000. of the preferred stock of the Northern Pacific Railway Company, making a total of $78,108,000. of the stock of the Northern Pacific Railway Company, in one lot, for which it paid the lump sum of $91,407,500. Of this price the Northern Securities Company paid $8,915,629. in cash and $82,491,871. in its own stock at par. That is one transaction. * * *

"Q. From whom did you purchase this large block of common and preferred stock—thirty-seven millions of common and forty-one odd millions of preferred?

"A. That is the block of stock referred to in the testimony of Mr. Steele and Mr. Perkins as having been purchased from E. H. Harriman and Winslow S. Pierce, trustees, and afterwards turned over to the Northern Securities Company.

"Q. Who carried on the negotiations for the purchase of that stock from Harriman and Pierce?

"A. J. P. Morgan & Co., or some members of that firm. I don't know of my own knowledge which one of them. It appears from the evidence of Mr. Perkins and Mr. Steele that they were the members that conducted the negotiation; that is the source of my information.

"Q. Do you know how the price paid for this large block of stock was reached; upon what basis the computation, if any?

"A. I have not the slightest idea and have never been able to form one.

"Q. The stock was purchased by J. P. Morgan & Co., and then turned over to you and you carried out the terms?

"A. Yes, sir.

"Q. The purchase as arrived at between J. P. Morgan & Co. and Harriman and Pierce was transferred to the Northern Securities Company, and the Northern Securities Company carried out the sale by direct dealing with Harriman and Pierce on the 18th day of November of last year.

"Q. It issued to Harriman & Pierce some eighty-two millions of its own common stock?

"A. Yes, sir.

"Q. And paid them over $8,000,000 in cash?

"A. $8,915,629 in cash.

"Q. Does the stock of the Northern Securities Company thus issued to Harriman & Pierce still stand in their names?

"A. It stands in their names on the books of the Securities Company. That is the extent of my knowledge about its present ownership."

Mr. HARRIMAN, in the Government Case, (see p. 292) of the record in this case, testified as follows:

"Q. You *finally* agreed to turn in your holdings and receive from the Northern Securities Company upwards of $82,000,000.00 in stock of this company?

"A. Yes, sir.

"Q. Did you know at that time on what basis this holding company was to take in any other Northern Pacific or Great Northern stock?

"A. Yes, sir.

"Q. On what basis?

"A. $115.00.

"Q. For the Northern Pacific?

"A. Yes, sir.

"Q. And what for the Great Northern?

"A. $180.00."

And again on Record p. 293:

"Q. Did they represent to you that that was the basis on which they were going to take in the stock?

"A. The statement was made to me that they would put this Northern Pacific stock into a *holding* company, and give us—not this Northern Pacific stock—but that they would give us in part payment a *holding company's stock*, on the basis of $115.00 for Northern Pacific, and if Great Northern were taken in, on the basis of $180.00 for Great Northern."

Again on Record p. 294:

"Q. No, but what I want to get at is this: Didn't you understand from their statements that the *basis of exchange*, if any was made, was $115 and $180?

"A. Yes, sir."

And on Record, p. 294:

"A. All I remember is just what I stated; statement made to me that if this *trade* went through they would *pay* us in the shares of a *holding* company which would issue *its stock in exchange* for Northern Pacific at $115.00 and Great Northern at $180.00, *and I agreed to take that stock in exchange for the Northern Pacific we held—all the Northern Pacific we held.*"

GEORGE W. PERKINS, a member of the firm of J. P. Morgan & Company, who were the promoters of the Northern Securities Company and the combination, testified in the Government Case as follows: (p. 232.)

"Q. Mr. Perkins, you purchased the common and preferred stock of the Union Pacific interests, amounting to between $75,000,000 and $80,000,000, shortly after the organization of the Northern Securities Company?

"A. Yes, sir.

"Q. Now, what did you ultimately do with all of that stock?

"A. We sold it to the Northern Securities Company.

"Q. And when?

"A. I should say two or three weeks after the company was organized."

(Page 234.)

"Q. And all negotiations with reference to the subsequent disposition of that stock—common and preferred—to the Northern Securities Company were had after the conclusion of the deal with the Union Pacific interests.

"A. We did not CLOSE any deal with the Union Pacific interests.

"Q. Well, at the time you purchased from the Union Pacific interests did you pay part cash?

"A. No, sir.

"Q. Did you pay any cash at the time you made the deal with them?

"A. *We undertook to get them a certain amount of stock from the Northern Securities Company—a certain sum of money in exchange for their holdings,*

"Q. Was this stock absolutely transferred by the Harriman or Union Pacific interests to your firm, or

simply transferred to you for the purpose of making a disposition of it to the Northern Securities Company?

"A. I do not know what the transfer books will show.

"Q. Well, what was the fact?

"A. I do not know. That would simply be a matter of clerical work.

"Q. What was your understanding or arrangement in case you had failed to make a deal with the Northern Securities Company for the *turning in* of all this stock to it; would you have had it on your hands—$78,000,000 or $80,000,000 of preferred stock?

"A. No, sir; the Union Pacific would have had it."

CHARLES STEELE, another member of the firm of J. P. Morgan & Company, testified in the government suit (pp. 291-292.)

"Q. What did your firm have to do with the purchase of the Harriman interests in the Northern Pacific, Mr. Steele?

"A. My impression is that it was my firm that conducted that negotiation entirely.

"Q. Will you state what those negotiations were?

"A. I think it was a little after the middle of November, after the meeting of the Northern Pacific board at which it was resolved to retire the Northern Pacific stock. They expressed a desire to be allowed to part with their stock. It had become, by the retirement of the preferred stock, a minority interest, and it was rather an unsaleable commodity, as the stock had been practically withdrawn from the market, and they asked

us if we wouldn't undertake—I say they asked us, it came up between us, I am not sure which one suggested it—undertake to get the Northern Securities Company to buy their stock. We finally agreed upon a basis by which they agreed to sell their stock for a lump sum, which was to be payable partly in cash and partly in stock of the Northern Securities Company. At that time, Mr. Harriman—I shall have to apologize whenever I say Union Pacific, because I never really knew whether that was so—Mr. Harriman and his friends held both common and preferred stock, in the proportion, I think, of about 37,000,000 common to 41,000,000 preferred, in round figures, and their proposition was to sell us that stock in one block for a fixed sum, which was to be paid partly in cash and partly in Northern Securities Company stock, and we undertook to try and get the Northern Securities Company to buy that stock on those terms, we acting as bankers between them.

"Q. You acted then in that transaction, as I understand it, as middlemen?

"A. As bankers.

"Q. That is, it was not a purchase outright by your firm?

"A. No.

"Q. Or a purchase in which your firm obligated themselves to pay a fixed amount of cash?

"A. No; it was only a purchase by us if we succeeded in getting the Northern Securities Company to take it, and the terms were that we were to turn over just exactly what we got.

"Q. You were really then, in negotiation with the Northern Securties Company,—you were really negotiating for the Union Pacific or Harriman or Short Line interests?

"A. We were bankers in between. I wouldn't say we represented either side particularly. We were very often put in that position."

X.

This Court had before it in the Government Case all the testimony which was before the Court of Appeals in the present case as to the manner in which, and the purpose for which, the Northern Securities Company acquired the Oregon Short Line stock in the Northern Pacific Railroad Company, and this included the evidence of Mr. Harriman.

The only possible exception to this is the *ex parte* affidavit of Mr. J. J. Hill and the affidavit of Mr. Harriman filed in the present case.

But this Court had before it all of Mr. Harriman's evidence, and the affidavit now filed does not contradict that evidence, properly and fairly understood.

This Court had also before it the whole of Mr. Hill's evidence, and also the copies of the resolution of the Board of Directors of the Northern Securities Company which he annexed to his *ex parte* affidavit in the present case.

This Court then had before it the fact that for the Oregon Short Line stock in the Northern Pacific Railway Company the Oregon Short Line received in stock certificates of the Northern Securities Company, $82,491,871.00 at par, and cash $8,915,629.00.

Nine-tenths (9-10) of the total exchange value for the Oregon Short Line stock was given in stock of the Securities Co. at par. The fact that one-tenth (1-10) was given in cash is of itself, and as far as it goes and unexplained, some evidence against the exchange theory, but when it is remem-

bered this cash was connected with our preferred stock which was to be converted into common by the Securities Co., and it was only one-tenth (1-10) of what the Oregon Short Line received, and nine-tenths (9-10) was in stock at par, it cannot overcome all the other evidence in the case, including the evidence of J. J. Hill, (P. 96), that the Oregon Short Line stock was

"exchanged the same as other stock."

Whatever significance there was in the cash received by the Oregon Short Line was before this Court in the Government Case and allowed by it:

Whatever significance there is in Mr. Harriman's evidence was before this Court in the Government Case.

On the question of the ownership of the Northern Pacific stock by the Securities Co. there is nothing—absolutely nothing—which this Court did not have before it in the Government Case.

XI.

Not only did the pleadings sharply raise the issues (ante pp. 3, 4, 90, 91) in the Government Case,—and this court discussed these issues and decided them, but the evidence in the Government Case, including all of Mr. Harriman's, supported the conclusions of this court on those issues.

The respondent endeavored in the court below, by selecting isolated statements from the testimony of Mr. Harriman in the Government suit, without showing the context or connection in which the statements were made, to show that the Securities Company took an absolute title to the Harriman stock. It thereby utterly ignored the fact that this precise testimony was before this Court in the Government suit, and from it and the other evidence in that case

this Court found that the Securities Company was not a purchaser but a mere custodian or trustee for the original stockholders.

The Northern Pacific stock of appellants was indispensable to the success of the combination. Without it the Securities Company would not have had control of the Northern Pacific and the whole conspiracy world have failed. It was an integral, absolutely necessary part of the scheme.

Mr. Justice Harlan, 193 U. S. page 353, discussing the contention of the Securities Company, that its acquisition of the Railway stocks was a purchase, an investment by it, said:

> "This view is wholly fallacious and does not comport with the *actual transaction*. There was no *actual investment* in any substantial sense by the Northern Securities Company in the stock of the two constituent companies. *If it was in form such a transaction, it was not in fact one of that kind.* * * *
>
> "That disclosed the actual nature of the transaction which was only to organize the Northern Securities as a *holding* company, in whose hands *not as real purchaser or absolute owner*, but simply as custodian, were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the *shareholders* of the constituent companies."

This court plainly said that the Securities Company merely represented the combination formed between the shareholders, and it took their stocks,

> "not as a real purchaser or absolute owner, but simply as custodian."

Nevertheless, the respondent, citing portions of the testimony already passed upon by this Court, in which Harriman says that he "sold"—that the Securities Company "purchased"—that the "sale" was without "conditions," &c., now asks this court upon consideration of these fragmentary extracts from this same testimony, to make a finding in direct contradiction to its finding in the Government Case, and to do so in the present case to which the Government is not a party, and in which this Court cannot change or alter what it decided in the Government case.

Whether or not a transaction is a purchase or a sale is a conclusion of law, and Harriman's testimony in reference thereto was merely his opinion of what was the legal effect of the acts of the parties. It best subserved the purposes of Morgan and the others who promoted the Securities Company in depositing their stock, to go through the form of a sale and to call it such in their testimony, and Harriman, influenced by what Hill, Morgan and others may have called it, no doubt thought, as a matter of law, that the transaction was a sale when he so testified, but this Court has said it was so merely in form—not in substance—the actual transaction was not a sale or purchase. The Court will always look at the substance of a transaction—what the parties actually did, uninfluenced in any respect whatever by any name they have called it.

To show how conclusively this finding of the Supreme Court is supported by the evidence, we give below extracts from the testimony of Messrs. Harriman, Morgan, Hill, Clough, Steele, Perkins, and Kennedy, in the Government case and extracts from their answers.

EDWARD H. HARRIMAN testified: (p. 631, record in Government suit)

"Commissioner Prouty. I think what Mr. Day wants and what the Commissioner would like to know, if it is material at all, is what agreement was made, what understanding was had, as to the organization of the Securities Company, of which you agreed to take the stock at par.

"Mr. Harriman. *We agreed to take the stock at par if the Securities Company was formed, and the Northern Securities Company stock issued in payment for Northern Pacific stock not to exceed 115, and if the Great Northern stock were put in that should not exceed 180. That is the plan.*

The Chairman: That arrangement fixed a price, and part of it was to be paid in money and the balance in securities, and included in those securities was an agreement on your part to take a certain amount of the secuties of the Northern Securities Company, if organized on a certain basis.

"Mr. Harriman. Yes, sir.

"The Chairman. Subsequently it was organized on that basis?

"Mr. Harriman. And the stock was delivered and recieved.

"The Chairman: And you took the stock of the Northern Securities Company in payment of the Northern Pacific stock that you sold?

"Mr. Harriman. Yes, sir. * * *

P. 901.

"A. * * * *It was only towards the end, when the thing crystallized that the suggestion was made that payment should be made partly in cash and partly as a holding company stock.* * *

P. 904.

"Q. You FINALLY agreed to *turn in* your holdings and receive from the Northern Securities Company upwards of 82 millions in stock of this company?

"A. Yes, sir.

"Q. Did you know at that time on what basis this *holding company* was to *take in* any other Northern Pacific or Great Northern stock?

A. Yes, sir. * * *

Pages 905 & 906.

"Q. Did they represent to you that that was the basis on which they were going to *take in* the stock?

"A. *The statement was made to me that they would put this Northern Pacific stock into a holding company and give us—not this Northern Pacific stock—but that 'they would give us in payment a holding company's stock on the* basis of $115 for Northern Pacific, and, if Great Northern were taken in on the basis of $180 for Great Northern.

The statement was simply made that they were going to form a holding company, or had formed a holding company, and would pay us in this stock, and that those were the terms on which it was to be bought.

"A. * * * It was a simple statement *that they were going to* CHANGE *these shares of Northern Pacific and Great Northern on such a basis, and that they would make us part payment in that stock.*

"Q. That is what I want to get at. They told you, then, that certain holders of the Great Northern and the Northern Pacific were going to exchange their stock for the stock of the Northern Securities Company, on the basis of $115 for the Northern Pacific and $180 for the Great Northern?

"A. They didn't say certain ones, *but they were going to form this holding company*, and that they

would pay me in the *holding company's stock*, which should be issued on that basis.

* * * *

"A. All I remember is just as I have stated; a statement made to me that if this TRADE went through they would pay us in the shares of a *holding company which would issue its stock in exchange* for Northern Pacific at 115 and Great Northern at 180. And I agreed to take so much of that stock *in exchange* for the shares of the Northern Pacific we held—all the Northern Pacific we held."

This portion of Mr. Harriman's evidence was not even noticed by Judge Dallas.

JAMES J. HILL testified as follows:
(Pages 82, 83 and 84).

"A. The Northern Securities Company, or a company of that character, has been considered by the large shareholders of the Great Northern Railway Company for several years.

"Q. And for what purpose, Mr. Hill?

"A. *For the purpose of combining their interest in the property.*

"Q. And what was the object or purpose of the combination?

"A. Some of them were very old men, and they had always acted together and in harmony, and *they desired to perpetuate that action.* . . .

"Q. *And was that the purpose and object, Mr. Hill, of your organizing the Northern Securities Company?*

"A. *That was the purpose*

"Q. And at the time of the organization of the Northern Securities Company were these things that you have told us the only objects or purposes that you had in mind at that time?

"A. *The action in buying the majority of the stock of the Northern Pacific in the market in April or May, or both, brought the question up more strongly than before as to the necessity of the Great Northern old shareholders who had been continuously connected with the property from the beginning making their holding together permanent.* * * * The relations growing out of the large purchases by the Union Pacic interests of the Northern Pacific, and suggested whether we should not include in our *holding company* our holdings in the Northern Pacific.

"Q. *And for the same purpose?*

"A. *For the same purpose, so that we would all act together and no one would sell out or leave the others.* We would all act together.

"Q. For the purpose of *unifying* the interests that you had in the two roads?

"A. *Yes, sir; for the purpose of unifying the interests in each road.* * * *"

P. 86.

"Q. Well, then at the time you formed the Northern Securities Company, organized the Northern Securities Company, had you agreed upon the basis at which the Northern Pacific stock should be *turned into* the Northern Securities Company *in exchange for* Northern Securities stock, as well as the basis on which the Northern Pacific stock should be turned in in exchange?

"A. My recollection of that is that possibly in my interview with Mr. Kennedy, early in June, soon after his return from Europe, that the question came up

as to how, *if we put our own holdings into a company, upon what basis this stock would go in, and he asked me to turn it over.* Maybe I wrote him and maybe I saw him; but I think the basis—I think, after consulting with two or three of the shareholders, I fixed the rate upon which each, the Northern Pacific and the Great Northern, would be *taken* or *purchased* by the *holding company* when such *holding company* was organized. * * * *"

P. 96.

"Q. Mr. Hill, do you know that as a part of the consideration for the sale of Harriman stock, so called, to J. Piermont Morgan & Co., a large block of Northern Securites Company's stock, which was to be issued later, was to be turned over to Harriman or his associates?

"A. *I knew that the stock was exchanged the same as other stock. Now, that is all the exact information I had on the subject.*" * * *

P. 689.

"A. * * * That had been considered for a long time, although in view of what happened, Mr. Kennedy said *we must devise some plan to prevent hereafter such raids as have occurred.*"

P. 693.

"Q. * * * *What was the purpose* after that time of youg entlemen who promoted the Northern Securities Company *in forming that company and putting into it a majority of the stock of the Northern Pacific Company?*

"A. We were particularly anxious to put a majority of that stock *where it could not be raided again as it had been.* We wanted to put it in a corporation that was not a railroad company—a company that *would hold it as an investment*, and the larger the company

the more difficult it would be to secure a majority of it."

Letter of James J. Hill to Great Northern stockholders (p. 703):

"November 30th, 1901.

"Replying to you letter of the 23d asking for further information about the Northern Securities Company, I beg to say * * * *These men have deemed it wise to make PERMANENT arrangements for the protection of their interests and for securing a CONTINUOUS policy in the management of their properties. Believing the Northern Securities Company will secure the objects named, they have generally sold to it their holdings of Great Northern shares, on the terms stated in the circular.*" * * *

P. 705.

"Q. You state in this letter: 'The organization of such a company has been considered for many years by the original promoters of the St. Paul, Minneapolis & Manitoba Railway Company, and its successors, the Great Northern Railway Company, who have always remained the largest shareholders therein. These men have deemed it wise to make *permanent arrangements for the protection of their interests and for securing a continuous policy in the management of their properties.* What did you mean by that?

"A. The protection of their interests; *protection from raids like the one which had been made in May previous* on the Northern Pacific. Some such raid might be made on the Great Northern. And for the *making permanent* the general policy."

The answer of the Northern Securities Company (page 42) and the answer of James J. Hill (page 62) contains the following paragraph:

"As far back as 1893, most of these gentlemen being well advanced and some far advanced in years, they began to discuss together what would be the effect upon

the policy, which, under their influence the company had pursued with great benefit to its shareholders and the public, *should their holdings by death or otherwise become scattered, and by what means THEIR HOLDINGS COULD BE KEPT TOGETHER, so as to secure the continuance of such policy in the management of the company.*"

Answer of Northern Securities Company, p. 43:

"In the fall of 1900 Mr. Hill and said Great Northern shareholders discussed the question of *putting their holdings of Northern Pacific stock into the proposed holding company*, as well as the suggestion that all the other stockholders of the Great Northern Company should be given the opportunity of selling and transferring their shares to the holding company, and that its capital stock should be made large enough to enable it to buy such holdings."

Answer James J. Hill, p. 67:

"*The Securities Company, as now existing, became and is necessary as a defensive measure against attempts of rival interests to gain control of the direction of one or both of defendant railway companies.*"

JOHN S. KENNEDY testified as follows:

Page 192, * * *

"Q. Do you mean to say, Mr. Kennedy, that the plan has matured, so far as it related to the Great Northern road was concerned was to form this securities

Company and give every stockholder a chance to *turn in* his stock to the Northern Securities Company?

"A. *Yes; if he chose to do so.*

"Q. *And to take in return therefor stock of the Northern Securities Company?*

"A. *Yes, sir;* that was not the original plan.

"Q. I understand.

"A. *But as finally consummated.* * *"

P. 194.

"Q. Now, at the time the suggestion came up of making a securities company, organizing a securities company *for the purpose of carrying the stocks of you gentlemen* in both roads, did it not?

"A. Yes, sir.

"Q. And later on it was decided to throw the privilege open to *any and all the stockholders* of the Great Northern, was it not?

"A. Yes, sir; I think that was it." * *

P. 195.

"Q. *You wanted to have a majority of the stock of the Northern Pacific where you could ABSOLUTELY CONTROL it?*

"A. *Yes, sir.*

"Q. *Under all circumstances?*

"A. *Under all circumstances.* * * *

"Q. Well, why did you distinguish? *You say you wanted a majority of the Northern Pacific where you could absolutely control it so as to prevent another such occurrence as that of May 9th?*

"A. Yes. * * *"

Page 196.

"Q. *You were just as anxious to prevent an attempt to buy up a majority of the Great Northern by a rival interest as you were to prevent an attempt to buy up a majority of the Northern Pacific, weren't you?*

"A. I *didn't want an attack in either case.*

"Q. That is what I am getting at—that is, a purchase by a rival interest of a majority of the stock of either *the Great Northern or the Northern Pacific was a thing which you were trying to prevent, was it not?*

"A. Yes, sir; that was our idea; at least, that was my idea; I speak for myself. * * *"

Page 197

"Q. Now, you gentlemen, Mr. Morgan, Mr. Hill, and his associates and yourself, at the time you conceived and agreed upon the plan of organizing the Northern Securities Company, agreed among yourselves to *turn in* a majority of the stock of the Northern Pacific into the Securities Company, did you not?

"A. I don't remember of any special agreement made on that subject. I think it was understood they would *turn it in.*

"Q. *So as to place a majority of the Northern Pacific ABSOLUTELY in the Northern Securities Company?*

"A. *Yes, sir; that was my idea.*

"Q. And so far as you know that was the idea of the other gentlemen associated with you?"

"A I suppose it was. I have no information on that point.

* * * * *

Page 223

"Q. Didn't Mr. Hill state to you and give you to understand so that you felt practically sure that a majority of that stock was *going in* before the Securities Company was organized.

"A. The impression I got was that a majority would *go in*, but when you ask for knowledge, I don't know."

* * * * *

GEORGE W. PERKINS testified as follows:

Page 234

"Q. Did you pay any cash at the time you made the deal with them?

"A. *We undertook to get them a certain amount of stock from the Northern Securities Company—a certain sum of money in exchange for their holdings.*

* * * * *

"Q. What was your understanding or arrangement in case you had failed to make a deal with the Northern Securities Company for the turning in of all this stock to it; would you have had it on your hands—$78,000,000 or $80,000,000 of preferred stock?

"A. No, sir; the Union Pacific would have had it. * * * "

Page 240

"Q. When was there first brought to your attention the adoption or the formation of any company, whether called the Northern Securities Company or any other name, to hold the stock of the Northern Pacific or the Great Northern Railway Company?

"A. The idea of a *holding company* to *hold* the stock of the Northern Pacific Company was brought to my attention after my return from Europe in the autumn of 1901."

CHARLES STEELE testified as follows:

Page 290

"A. * * * *The question of forming some sort of a holding company* to *hold* the Northern Pacific stock, which we had bought and which was held by our friends at that time, was discussed about then.

* * * *

"A. * * * I said in the summer of 1901 the matter of *putting* the Northern Pacific stock which we held into a securities company was first brought up."

Page 296

"Q. When was the time that the ratio at which the stocks of the Northern Pacific and Great Northern were to be *turned into* the Northern Securities Company first brought to your attention?

"A. The only time it ever came to my attention was when the suggestion was made that the stocks which *we hold*—the Northern Pacific which *we hold*, or our friends, should *go in*."

Page 299

"A. * * * *I knew a holding company was to be formed, into which I assumed that Mr. Hill and his friends were going to put their Great Northern stock. The first time that my attention was called to the* fact that the Northern Pacific stock would be *taken in* as well was when we made our negotiations to *put in* our Northern Pacific stock which our friends held, as to which I have testified. * * * "

Page 301

Mr. Stetson:

"A. The question of a *holding company* for the stock of the Great Northern Railway Company was brought to my attention, I think, in the spring of 1900, almost the first time I went into the firm of J. P. Morgan & Co. The idea of a *holding company* to *hold stock* of the Northern Pacific Company was brought to my attention along the latter part of the summer of 1901."

Pages 303 & 304.

"A. * * * It was understood that our friends by which I intend to mean the same persons that I tried

to describe to Mr. Boutelle, were to have the right to *put their stock in* at the same figure."

J. P. MORGAN testifies as follows:

Pages 344 and 345

"Q. And then you had that in your own mind to have a holding company for the Northern Pacific?

"A. That came up after I came back. *When we found ourselves in this position, with the danger, having escaped as I thought at that time from what I thought was a great danger:* that is to say, our property being absorbed by a competing line without our knowledge or consent. *It occurred to me something ought to be done to prevent that,* because, while we chose to defend the property, I *did not want it to go on indefinitely, and I thought the best plan was to go to some trust company. My idea was first to go to some trust company to take the Northern Pacific stock and hold it.*

"Q. That is, to *hold* control?

"A. *Hold control, of the stock. Just to surrender it to them and take their receipt.*

"Q. For the purpose of keeping control in one place?

"A. No; not alone to keep it in one place, *but to keep it so that the policy of the company upon which its future depended could not be continued. We didn't want convulsions going on.* You cannot take a company with three or four hundred millions of securities and do one thing one day and another thing another. It destroys confidence in the first place, and everything of that kind. *What I wanted to accomplish was to put*

that stock so that it could be protected—to maintain the policy of the company as it then existed."

Page 347

"A. * * * *My idea was I can't live forever, and J. P. Morgan & Co. may be dissolved. I wanted this effected, so that the policy we have incorporated and created shall be continued on that property if the stockholders chose to put the stock there.*

"A. * * * I don't remember talking with him, Hill, until when we came to discuss this question when I made up my mind to do this thing. He was a large stockholder of the Northern Pacific, and I said I think that has got to be done. *I will not take the responsibility of going through anything of this kind again.* If a man has got 10,000 shares of stock, and acts with you, and he is your friend, to-morrow somebody comes on and offers him 100 per cent. profit, and he will sell his stock, and you will find yourself left in a box. *The consequences are too serious. I said, 'it can't go on that way.'*

"Q. What was the result of your talk with Mr. Hill?

"A. The result of it was that we decided that the Northern Pacific, so far as I was concerned as a stockholder in the Northern Pacific, I would *put my stock in* provided that he would *take everybody else's into this thing* that he had proposed to arrange for the Great Northern.

"Q. That is, this Northern Securities Company?

"A. Yes.

"Q. That is, provided he would *go in* himself?

"A. Yes, of course. Well, I didn't care whether he went in or not. We had a majority without him. I

wanted a majority of the Northern Pacific stock in that securities company. *I didn't care who went in, provided there was enough there to protect the Northern Pacific.* * * * "

P. 349

"A. * * * *I wanted simply to keep the stock of the Northern Pacific safe beyond question.*"

P. 351

"Q. Did you see a circular sent out by Mr. Hill to the stockholders of the Great Northern advising them to *turn their stock into* the Northern Securities?

A. Oh, yes; I got one of those as a stockholder, and *I turned mine in.*"

P. 352

"A. * * * I knew what the price of the two stocks were to be before I *put in* my stock, but whether it was before or after the organization—legal organization of the company—I don't know."

P. 354

"A. He was acting for his stock and I for mine, with the condition that if the Northern Securities Company was organized the holders of the Northern Pacific stock should have the right to *put in their stock* the same as we did. * * *"

P. 355

"A. I have already said to you that the Great Northern Company and a holding company was a thing of Mr. Hill's plan. The question simply was whether J. P. Morgan & Co. should select the Northern Securities Company as the CUSTODIAN for *our* Northern Pacific stock or not, so that it was really Mr. Hill's plan, and the Great Northern went in before I did. I told you before he had arranged that for his road and subsidiary companies, at least that or *some holding company*, so that was long before this thing came up."

"Q. You have explained that it was your idea that it would be a good plan to put the control of the Northern Pacific into a trust company or into a *holding company*, and Mr. Hill apparently held the same theory as to his stock.

"A. Not at the same time.

"Q. No; not at the same time; he had worked that out some years ago in his mind. You had both been working the same thing out. Why was it agreed to put the stock of both these companies in one *holding company?*

"A. *It seemed to me the better way of putting it.*

"Q. *But why?*

"A. *Why, on the face of it, it did not make any difference to me.*

"Q. Why put the stocks of both these companies into one *holding* company?

"A. *In the first place this holding company was simply a question of custodian, because it had no other alliances.*"

XII.

The so-called permissive portion of the decree certainly did authorize the return by the Northern Securities Company to the individual stockholders who assigned to Securities Company the identical stock so assigned. If it was Northern Pacific stock, then Northern Pacific stock was to be returned.

This return was to the individual.

It was not a return to the combination. By returning to the individual, the combination was disintegrated and the individual stood as before the combination, with the prohibition of entering into a combination,

If, on the contrary, the return was to the combination, that is, that the assignment had effected an actual pooling and transfer of the title of the stock, then the combination would have held the control of both the railroads instead of the intermediary, the trustee, the Northern Securities Company. Such result would have been diametrically opposite to the opinion and decree of this Court, and would have perpetuated the combination.

You did not at any step of the case admit that a legal title passed to the stocks. The illegality of the acquisition —the illegality of the holding—were both predicates for your conclusions. Therefore, the trusteeship of the Securities Company necessarily was for the individuals, not for the combination.

The individuals *before* each assigned, each owned his stock, and the Securities Company merely handed back his own. In this return he did not rely on the title of the Securities Company. But if the assignment to the Securities pooled all the stock and gave to each of the combine an interest in the joint pool, then it is obvious the title passed out of the assignors and into each member of the combine through the Securities Co. In no other way could the *pool* of the stocks be effected—

This would be to affirm the legality of the assignment—

It would be to contradict the affirmation by Mr. Justice Harlan, that the decree did not destroy property rights, for if our Northern Pacific stock is vested in the Combine and we are to take from the Combine for our Northern Pacific, stock in the Great Northern, and that is the meaning of your opinion and decree, our property rights are certainly affected.

Judge Harlan's language was

> "The decree, if executed, will destroy *not the property interests of the original stockholders of* the constituent companies but the power of the holding corporation."—

XIII.

Judge Thayer's St. Paul Opinion.

The court below, (Judge Dallas), quoted largely from the opinion of Mr. Justice Thayer at St. Paul when the application of the appellants to intervene was denied, and the lower court (Judge Dallas) instead of reading the opinion and decree of this court, and especially reading your decree in the light of your opinion, read your decree solely in the light of the opinion of Judge Thayer at St. Paul, and as we respectfully urge, misapprehended his meaning.

Properly understood and read, we think that the St. Paul opinion of Judge Thayer as to the meaning of the St. Louis decree, and the St. Louis decree itself, are perfectly consistent with the meaning which we urge should plainly be given, to the decree of this court, read in the light of your opinion.

Other counsel, (Mr. Guthrie) has fully treated this in his brief, and it is not here intended to re-state what he has there so well said.

The present Brief assumes (for the sake of argument) that the court below, (Judge Dallas) and the appellees in this case correctly construed the meaning of the opinion of Mr. Justice Thayer at St. Paul. What we purpose to show is that if they have so correctly construed the opinion of Mr. Justice Thayer at St. Paul, then such St. Paul opinion should not be allowed to effect, and especially not to control the conclusions of this court as to the meaning of its own opinion and decree.

That St. Paul opinion, we submit, is open to the following just criticism:

(A) Among other things it said—

"The decree was wholly prohibitory."

We submit this is not correct, because—

(1) The decree itself affirmatively found—
"That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade or commerce among the several states such as an act of Congress, approved July 2nd, 1890. * * * denounces as illegal."

(2) "That all of the stock of the Northern Pacific Railway Company and all of the stock of the Great Northern Railway Company now claimed to be held and owned by the defendant, the Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several states."

These findings of fact are parts of the decree which authorized the return of the stocks, and this authority should be read in the light of those findings and of the opinion of this Court.

(3) The court overlooked the fact that by the prior portions of its own decree it had tied up the Northern Pacific stock in the hands of the Northern Securities Company in such manner that it was impossible for the Securities Company by the mere assignment of the stock without the leave of this court to vest in the assignee an absolute title with the rights of ownership in the stock, including the right to vote, collect dividends and exercise influence.

We refer to the argument in the prior portions of this brief in support of this proposition.

(4) Affirmatively, not negatively, the court permitted the return to the original stockholders of the specific railroad stock assigned to the Securities Com-

pany, and gave authority to the Securities Company to so part with the stock.

Why, if it was not fair and equitable did the Court do this?

(B) This return, the St. Paul opinion, called

"merely permissive,"

and as being one that was

"tentatively suggested,"

and that the fact that the directors of the Securities Company

"have proposed to its stockholders a plan of distributing the stock of the two railway companies in a manner somewhat different from that which was tentatively suggested by the decree, but not commanded, cannot be regarded as a failure to obey the decree."

As we have hereinbefore shown, the present plan proposed by the directors to the stockholders of the Securities Company is a plan diametrically opposite to, and entirely inconsistent with, the findings of fact in the St. Louis decree, and the mode of the disposition of the stock by the return to the original stockholders. The carrying out of such a plan, therefore, must contradict the decree in two respects:

(a) To carry it out it must be affirmed that the Securities Company became the lawful purchaser and the lawful, absolute owner of these railroad stocks, but the decree itself had already found that it had acquired them in virtue of the illegal combination, and it held them in virtue of that, and that therefore, both the acquisition and the holding were illegal.

(b) The return of the railroad stocks to the original assignors necessarily was based upon the proposition that the Securities Company had not received a lawful, absolute title to the same.

If the Securities Company had received a lawful, absolute title, then the stockholders of the Securities Company would have had an interest through the Securities Company in that stock, and the St. Louis decree would not have taken from those stockholders property to which they were entitled, and especially not as the St. Louis Court, Judge Thayer said in his St. Paul opinion, doubted

> "its power to compel stockholders of the Securities Company who had not been served with process and were not before the court otherwise than by representation, (if indeed they were present by representation) to surrender stock which was in their possession and to take other stock in lieu thereof."

Even the permissive portion of the decree *gave authority* to the Northern Securities Company to make such exchange, and the court therefore necessarily determined that such exchange would be fair and equitable to all the stockholders of the Northern Securities Company.

If so, that which was directly opposite—as the present plan—and necessarily founded on a state of facts which contradicts the former decree, as does the present plan, is certainly an evasion of the St. Louis decree, and plainly an evasion and disregard of the decree of this court.

In the Government Case in this court you had before you solely the record which included the opinion and decree at St. Louis. By that opinion and that decree and the pleadings in the case you alone knew what was decided by the court at St. Louis:

You did not have before you the opinion of Judge Thayer at St. Paul, which was not delivered until after your opinion and decree, and in which your Opinion does not seem to have been studied.

Your opinion, and especially the findings of facts in it upon which you founded your decree, do not seem to have been considered by Judge Thayer. He seemed to refer wholly and only to the proceedings at St. Louis and not those in this Court.

You did not have before you the question, whether what is called the *permissive* portion of the decree should be made mandatory. The Government had not appealed from the St. Louis decree, and whether that portion of the decree should be allowed to remain as it was or be made mandatory, was not assigned for error, and was not before this court:

You did not have before you any of the sugggestions by Judge Thayer at St. Paul, as follows:

> "The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential".

The assertion in the St. Paul opinion that the mandatory prayer for the return of the stock was denied by the St. Louis court:

The averment in the St. Paul opinion that

> "When the decree was entered it was assumed by the court that when the stock was thus rendered valueless in the hands of the Securities Company the stockholders of that company would be able and likewise disposed to make a disposition of the stock, which, under all the circumstances of the case, would be fair and just, and would restore it to the markets of the world, where it would have some value, instead of being a worthless commodity.
>
> "It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Northern Securities Company, and that, if any controversy arose in the discharge of this function, in view of the

situation that had been created by the decree, it would be a controversy that would properly form the subject matter of an independent suit between the parties immediately interested."

That the portion of the decree authorizing the return of the stocks was tentative merely and permissive, and the fact that the directors of the company had proposed a plan somewhat different from that outlined in the decree, was not a failure to obey the decree:

That the St. Louis court expressly refused to make the decree when entered mandatory for the return of the stocks.

It is suggested that these remarks of Mr. Justice Thayer at St. Paul in reference to the St. Louis decree should be read in the light of the fact, (as the opinion at St. Louis when read will disclose), that the court in St. Louis decided the case on the ground that even if it could be held that the Northern Securities Company was the lawful purchaser and lawful owner of the stock, *still* the Government was entitled to recover. The St. Louis court did not in its opinion sharply distinguish as to whether the Northern Securities Company had purchased or held the stock merely as custodian. In whichever capacity it had acquired the stock, the court in its opinion held that the Government was entitled to a decree.

This court, however, when the case came here, as we have seen, sharply divided on the question as to whether the Securities Company had *really* purchased and become the absolute owner of the stock; the majority of this court held that it had *not*, but was merely the custodian or agent or trustee for the combination. Upon that finding your decree was based. Your decree must always be read in the light of that finding; so read, there can be no question whatever but what this court passed definitely and distinct-

ly upon, and found affirmatively that the Securities Company did not purchase, but became merely the custodian for the assignors of said railroad stocks.

Judge Thayer's St. Paul remarks should be read in the light of the suggestions made. To read your decree in the light of the St. Paul opinion, instead of in the light of your own opinion, would entirely overlook the distinct ground upon which you put the decree.

We think that the St. Louis decree did adjudge and decree what we have hereinbefore argued—and we do insist that the St. Louis decree itself is misconstrued by the St. Paul opinion, if that opinion bears the construction appellees put upon it.

We suggest as a possible explanation of Judge Thayer's St. Paul opinion the reason above given.

The St. Louis court did not make, as the controlling question in the case, the distinction between the real, substantial ownership and the mere holding of the railroad stocks as custodian that this court did.

XIV.

Error of the Court of Appeals in Deciding that this Court did not even "incidentally" consider the question of ownership and deciding this case as if the Government case had not arisen.

How could the Court below in view of the foregoing and after admitting, as it did, that the question in the present case was:

> *Does the Northern Securities lawfully and absolutely own the railroad stocks?*

say as it did—

"If the question before us had been involved and "decided in the suit of the *United States vs. The North-* "*ern Securities Company*, or if it had been passed "upon,

"*though but incidentally*,

"by the Supreme Court of the United States in dispos- "ing of the appeal in that case, we of course would "not regard it as an open one. But it was neither "decided *nor considered* at any stage of that litiga- "tion."

The very corner stone of the opinion of this court, reiterated, and emphatically reiterated (supra), was that:

The Northern Securities Company was *not* the *real purchaser* or *real owner* of these railroad stocks, but *merely* the custodian or trustee for the individuals who made up the combination

By your decree you denied that the Northern Securities Company was such real purchaser or real owner, for you there adjudged that all the railroad stock was

"acquired and is now held by it *in virtue* of such combination,"

which you had denounced as illegal.

To hold

"in virtue of"

an illegal combination is certainly not to hold as a real, substantial owner.

You took pains to explain in your opinion that when you deprived the Northern Securities Company of its rights which it would have had if it had been the real owner of the stock, that you did not strike down the property interests in the stock, because, as you explained, these property interests really belonged to the original stockholders, and not to the Northern Securities Company.

A careful reading of the opinions of Mr. Justice Harlan, Mr. Justice Brewer and Mr. Justice White emphasizes the fact that this court divided sharply on the question—

> Was the Northern Securities Company the real, substantial purchaser and owner of the railroad stocks?

And the majority of the court held that it was not.

As we have seen, Mr. Justice Brewer concurred, and Mr. Justice White, while dissenting on the grounds that Congress could not legislate in reference to the ownership of stock in a state corporation, did not assert that the Securities Company was the real, substantial owner of the stock.

To any one who has read and studied these opinions, it is simply incomprehensible how the court below could have made the statement and decided this case in the court below on the grounds that this court had never even *incidentally* considered the question of whether the Northern Securities Company really owned the railroad stocks.

If it had not been for the decision in the Government case this controversy could not have arisen. It is a sequence from that. It is closely bound up with, and influenced by, that decision. No one can understand or would pretend to discuss *this* case unless he carefully studied the other.

Yet the Court below (Judge Dallas) said:

> "The present suit is an *independent one*, and as its "subject matter is *distinctly different* from that of the "suit in which the United States was complainant, the "duty of this Court *to independently consider it* has "seemed to us to be both plain and imperative."

And he decided the case as if the Government case had never arisen.

If the Court of Appeals is correct in this statement, why did all the Judges in this Court consider the question of ownership of the stock such an important one that Judge Harlan used pages in its discussion?

Judge Brewer considered it and drew a distinction between the rights of an individual and of a corporation as to the purchase and ownership of such stocks.

And Judge White, while stating the question of ownership of such stock as held by Judges Harlan and Brewer, dissented expressly because Congress had not the power to regulate such ownership.

XV.

Equities.

It requires no elaboration in statement or argument to prove the inherent and controlling equities of complainants which loudly appeal to the chancellor in this case.

A simple statement of facts suffices.

Morgan, Hill & Co. organized the Northern Securities Company to control the Great Northern and Northern Pacific Railways and pool their earnings by acquiring a majority of the stocks of each railway. They themselves trans-

ferred large blocks of those stocks to the Northern Securities Company. The continued control of those two railways and the poolings of such earnings were the reasons why the Northern Securities Company was formed, and to it the railway stocks were assigned, and such purpose necessitated the continued holding of the railway stocks by the Northern Securities Company. If that company parted with either stock, the whole purpose of acquiring the stock and the inducement to the assignors to assign the stock would be defeated.

As a fact the Northern Securities Company never has parted with one share of the Northern Pacific or Great Northern stock.

Morgan, Hill & Co. induced, indeed, compelled the complainants to also transfer their Northern Pacific stock to the Northern Securities Company as part of, and to perfect the scheme aforesaid.

Record pages 157-158.

No consideration whatever was paid by the Northern Securities Company for such railway stocks—the Northern Securities stock being fixed at a figure which practically equalled both the Northern Pacific and Great Northern stocks—except that $82,491,871 in stock of the Northern Securities Co. and $8,915,629 in cash was issued to us for our Northern Pacific stock.

All parties fully believed this plan to be lawful and really beneficial to commerce, but the Supreme Court of the United States adjudged it was a violation of the Sherman Act, and made a decree which restrained the Northern Securities Company from carrying out the scheme and rendered the railway stock worthless in its possession.

This necessitated a dissolution of the Northern Securities Company, as the Supreme Court foresaw.

Now, waiving for the present the question of the title the Northern Securities Company took to such railway stock, it certainly took such title, whatever it was—and such title

was assigned to it by Morgan, Hill and Harriman—to accomplish a defined, well understood purpose—which was the continued control of the Great Northern and Northern Pacific railways, and the pooling of their earnings. Except for such purpose the railway stock would not have been assigned. If to the Northern Securities Company such control and pooling were and now are no longer possible, it is quite evident the inducement which procured the assignment of the stocks failed and rendered the continued possession of the stocks by the Northern Securities Company useless. What would the plain, ordinary man who allows his conscience to rule his action, do?

Evidently, the scheme having failed, put every one in *statu quo, ante* the transfer to the Northern Securities Company of their respective stocks—and this could only be done by re-transferring to each his stock, the Northern Securities Company still holds it—each still holds his Northern Securities Company stock. The re-transfer is simple. If there be strangers who came in afterwards and who have equities, do what is fair to them.

This would do even and exact justice to all and be inequitable to no one. It would forbid any one benefitting by the illegal scheme and give to each his own.

The scheme having failed and the continuation thereof being forbidden, why should the complainants who assigned to the Northern Securities Company at a comparatively low valuation their Northern Pacific stock, to carry out the scheme aforesaid, now when the scheme has failed, be compelled to part with a large portion of their stock without any consideration to them (complainants) to Morgan, Hill *et al.* and be compelled to take from Morgan, Hill *et al.* Great Northern stock then and now of comparatively less value than Northern Pacific? And especially, why should this be allowed to Morgan, Hill *et al.* merely because they happened to be in control of the Northern Securities Company and could dictate its action in their own favor?

What possible equities have Morgan, Hill, *et al.* to allege that through this failed scheme they acquired an interest in the Northern Pacific stock of the complainants?

When we add to this natural equity the fact that both the Circuit Court and the Supreme Court of the United States authorized such a return in *statu quo* and suggested it, it would seem as if the question should be considered as closed.

But let us consider more in detail the exact situation in this case of this question, and the contentions of the defendants below, appellants here.

The bill is filed by complainants who are the *cestuis que trustent* of the Northern Securities Company against their trustee, and they charge the Northern Securities Company as their trustee in two respects:

(1) The trust adjudged by the Supreme Court of the United States in the acquisition by the company of our Northern Pacific stock as our trustee for certain purposes:

(2) The Trust which always arises incidentally out of our relation to the Northern Securities Company as stockholders therein, and in the present also arises by implication after the rescission:

(3) Morgan, Hill & Co., in control of the Northern Securities Co., equally with that company, are our trustees and must act with extreme good faith to us.

The charge made is that our trustee threatens to take our Northern Pacific stock, which is our property and which the company holds as our trustee, and divide it among themselves, Morgan, Hill & Co. The trustee comes into court, acknowledges it can no longer act as trustee and carry out the purposes for which the stock was assigned to it, and that it must distribute the stock, but denies our title to the stock, and says it owns the stock *bona fide* and in-

tends to distribute it to themselves. Such a case peculiarly appeals to the Chancellor.

> "Courts of equity from their inherent jurisdiction assumed from the beginning the exclusive control over trustees in the discharge of their duties, whether effecting real or personal estate."
>
> Hill on Trustees, *42.

When we prove, as we have, that the existence of the trust and of our title to the trust property has been finally adjudged by the Supreme Court of the United States, then our trustee resorts to a defense which no Chancellor ever listened to from a trustee as against his *cestui que trust* In plain English, the Northern Securities Company (really Hill-Morgan group), our trustee says:

> I did receive your property from you with the agreement that I was to hold it as your trustee to accomplish certain results. I can no longer so hold or use it, for the Court has held such to be in conflict with the Sherman Act. But I am in possession of the property, and as the purpose for which the property was assigned was illegal, in which illegal purpose you and I each joined, you cannot maintain any suit against me to enforce the trust *and I will* keep or give away as I choose your property.

Need I discuss either the iniquity of such a defense or the necessity of this Court by its peculiar remedies compelling these people to be honest.

The very relation of trustee and *cestui que trust* implies the existence on each side of honor, conscience and good faith.

Story's Eq. Jur., Sec. 1268.

The trustee may not acquire a title adverse to his *cestui que trust* (*ibid*,, Sec. 1273 e), and if the title of his *cestui que trust* be assailed he must defend it (*ibid*., Sec.

1275). Want of fidelity by the trustee to his *cestui que trust* is ground for his removal (Sec. 1289). *Uberrma fides* is the rule governing their relations.

But the trustee says: I represent all the stockholders of the Northern Securities Company, and *some of these* purchased my stock believing I was the real *bona fide* owner of this Northern Pacific stock and *these* stockholders have superior equities to yours, for you at least stood silent and allowed such purchases to be made, knowing of such belief, and also knowing that I proclaimed myself the real *bona fide* owner of such stock.

If any such question could arise it would be an individual or separate claim by each purchaser where the facts of each would be proven by separate and independent testimony, and in which the claims would be as separate individuals, and not as stockholder.

But let us show how groundless any claim of that nature is:

Please notice that to support this alleged superior equity of these alleged purchasers, the following proof would be required.

(I) That they were induced to purchase by reason of their belief that the Northern Securities Company *bona fide* owned the Northern Pacific stock as its property, and that they never knew the question of whether they did so own it was in dispute;

(II) That these purchasers were led to so believe by the Northern Securities Company asserting that it did so *bona fide* own the stock and did not hold it as trustee;

(III) That the complainants knew that the Northern Securities Company had so asserted, and

that there was no dispute about the title, and knowing this, allowed these new stockholders to buy, and hence are now estopped as against them to set up their own title.

We deny the truth of these averments, and the case is barren of proof to sustain them. Where are the affidavits supporting such averments?

Not a single one is on file.

In no way is Mr. Harriman connected with the sale of any of the Northern Securities Company stock to outsiders, nor did he know of, nor in fact were any representations made by the Northern Securities Company as to its ownership of the railway stocks.

The affidavits of Nichols (p. 279) and Schley (p. 275) do in general language aver that sales of Northern Securities stocks were made, the purchaser believing that the Northern Securities Company owned the railway stocks, but it is obvious that the individuals who made these affidavits are using a phrase prepared for them and that they are testifying merely to their opinion as to what the purchaser of the stocks believed, and not what actually operated upon the mind of the purchaser to induce him to acquire the stock.

Not only is it not true that any single new stockholder bought relying upon such supposed *bona fide* title, but every one of them who bought stock of the Northern Securities Company after March 10, 1902, knew that the question of title to this Northern Pacific stock was in dispute. On March 10, 1902, in the Government suit the allegation was broad and express that the Northern Securities Company did not really *bona fide* own this Northern Pacific stock, but held it merely as trustee and custodian. Here was express notice given of the trusteeship.

It was a case where the Government might lawfully raise the question; where the Northern Securities Company was a party as well as the Northern Pacific Railway

Company, and where the Court had jurisdiction of the persons and the property and the question. The Northern Securities Company denied the averment, and the question how the Northern Securities Company held this stock became a matter in dispute and pending in the court.

Whoever after this March 10th, 1902, bought stock, had notice *pendente lite* of such attack on the title and was and is concluded by the decree in that case.

> "A purchaser of property *pendente lite* is as conclusively bound by the results of the litigation as if he had from the outset been a party thereto."
>
> *Tillon vs. Cofield*, 93 U. S. 163.

But see what a sham this plea of superior equities is: Who are these new purchasers of Northern Securities Company stock, and what are their names? When did they buy —before or after March 10th, 1902?

What did they buy?

Why do they not personally come into court and assert their superior equities? Such equities (if they exist) are personal to the individuals themselves.

How and when did they hear that the Northern Securities Company alleged it was the *bona fide* owner of the stock?

Who told them?

How was it that assertion induced them to purchase, when the fact was obvious that whether the Northern Securities Company held as trustee or owned the majority of the stock of the Northern Pacific and Great Northern was immaterial so long as it did control both railways—pool their earnings—and allow all its (Northern Securities Company) stockholders to share in this pool? The mere possession of such railway stocks with its power to vote and collect dividends insured the success of the scheme. What the title was the Northern Securities Company had to the railway stocks was relatively unimportant. It must hold the

stocks, for if it sold them the very purpose of the organization of the Northern Securities Company was defeated, *i. e.* control of both railways and pooling of earnings. As it had to hold them to effect its purpose, the title back of possession was not material.

Such title only became material when the Northern Securities Company desired to sell or distribute the stock, and this question did not arise until after the Supreme Court decision in 1904.

Even if we admitted (which we do not) that one or more persons bought stock of the Northern Securities Company under such circumstances as would give them equities, yet such equities are efficacious for the select few who may have them, and if they do possess them and they are of a nature to be set up in this case, a Chancellor would have no difficulty in the final decree in our favor to amply provide for them.

But that Hill, Morgan and others who hold a large majority of all the stock of the Northern Securities Company other than our own, and who are thus in control of the Northern Securities Company, can set up possible equities of a very few new purchasers behind which to hide, and under cover of which they can take our property, is preposterous. Hill, Morgan and Company themselves have no such equities, and they cannot masquerade as such using the marks of the meritorious few.

It is Hill, Morgan and Company who are taking our property and who now seek shelter behind the alleged one or two innocent holders:

And see how vicious this whole defence is:

Who is it, that so far as this stock distribution is concerned, are in control dictating it—and outlining the action of our Trustee?—

Hill, Morgan and Company.

They control the Northern Securities Company, and by reason of such control they owed to us extreme good faith.

Their position analyzed shows not a reliance on their own title or equities and not good faith to us, but they seek shelter behind the alleged title and equities of a few who, it is said, are *bona fide* purchasers of Northern Securities Company stock, believing and having good reason to believe it was owned by the Northern Securities Company.

And they do this, why—

Simply to make money for themselves.

They were the men who organized the Northern Securities Company for the purpose aforementioned.

They of all men knew the Northern Securities Company did not own the railway stocks.

They arbitrarily originally unfairly fixed the comparative value of $115.00 a share on the Northern Pacific, and $180.00 on Great Northern. In this we had no voice.

Record page 306.

They sat in the seat of authority and induced,—aye—compelled us to put in our Northern Pacific stock at an unfair valuation as compared with the value they arbitrarily put upon Great Northern. This, however, under the scheme only really effected the extent to which we would share in the pool dividends, for the Northern Securities Company was to hold as our trustee the Northern Pacific stock we put in.

Now that the Northern Securities Company can no longer carry out the purpose of its organization and the very inducement to us for turning in our Northern Pacific stock has failed, these same persons, Hill, Morgan and Company, calling themselves the Northern Securities Company, intend to dissolve the Northern Securities Company. They see that now the Northern Pacific stock is as it always was, if it and the Great Northern must be separated, of

greater comparative value than the Great Northern, and so what do our trustees do?

Seek to take the trust property belonging to us and put it into their pockets. They say that the Northern Pacific stock has increased in value, and the Great Northern decreased since the fall of 1901, when they were assigned to the Northern Securities Co. Now, these men who are actually our Trustees being in control of the Northern Securities Co., actually propose to take our Northern Pacific stock to make good their losses in Great Northern.

The facts need but be understood to have any Court of equity eager to prevent such iniquity.

The present proposed action of our Trustees, we regret to say, is in accord with their prior action. Morgan, Hill & Co. were our Trustees in the fall of 1901. They were then in control through the Board of Directors and officers of the Northern Pacific Railway Company.

In the fall of 1901, notwithstanding we were the owners of $78,108,000. par value of the Northern Pacific stock, of which $41,085,000. was preferred and $37,023,000. common, and which constituted a clear majority of the total capital stock of the Northern Pacific which was $80,000,000. common, and $75,000,000. preferred, our Trustees being themselves the owners of slightly more common stock than we owned, determined to disfranchise us and take our property for less than its fair value, and threatened to do so in this ingenious way: they had passed a resolution by which the Railway Company would retire all the preferred stock by paying for it at par, and they schemed to raise the money to pay for it by issuing bonds of the Railway Company, which bonds were convertible into common stock of the Company, and in order to deprive us of our fair share of those bonds *they restricted the subscription list to holders of the common stock of the Railway Company.*

Thus they largely increased their own holding of common stock of the Company at the expense of our holding of

preferred, and denied us our plain moral right as the owners of a majority of its stock to control the same.

It is true that this scheme was only in process of completion when the Securities Co. was formed, and it is not denied that appellants were forced into a situation in which aquiescence in this plan became a necessity, but its moral taint is not lightened thereby.

The whole case, and all the depositions and answers in this case and in the Government case, including the St. Paul application, overwhelmingly prove that, however the Northern Securities Company acquired the two railway stocks, and whatever was the title assigned to it, it still acquired and held the stocks for the purpose of promoting and perfecting the control of the two railways and the pooling of their earnings. To aid this purpose, which was supposed to be lawful, all these railway stocks were assigned to the Northern Securities Company; and, without the assurance that this was the purpose for which the same were assigned, the stocks would not have gone to the Northern Securities Company at all. The Northern Securities Company paid nothing for the Northern Pacific stock, issuing merely its certificate of stock in lieu thereof. Therefore, when the scheme has failed and the dissolution of the Northern Securities Company is compelled, no road seems so plain as the one that leads to the placing of each assignor of the railway stocks in *statu quo*. That Morgan and Hill, parents of the scheme which, in the end was declared illegal, should be allowed to fatten off of our stock which was assigned to the Northern Securities Company with the belief of the legality of their scheme and with the assurance of the continuation and perfection of the scheme, seems incredible now that the scheme has failed. Why should Morgan and Hill be given an interest in that stock?

Why should we be compelled to take Great Northern stock instead of it? No one that owned Northern Pacific

stock supposed when the Northern Securities Company was organized and the stocks assigned to it that the person who assigned the Northern Pacific stock was really acquiring an interest in the stocks of the Great Northern Railway, and *vice versa*, the owners of the Great Northern stock surely could not have thought that they were acquiring an interest in the Northern Pacific stock. Both these stockholders did acquire an interest, after the assignment was made, in the pooling of the dividends of both railway companies, and they did share indifferently in that pool. That was because such pooling was necessary to carry out the scheme and enable the respective assignors to benefit from the scheme; but it was not necessary to the scheme that the Northern Pacific stockholder who assigned to the Northern Securities Company his stock should receive an interest in the Great Northern, or that the Great Northern stockholder should receive an interest in the Northern Pacific. All that was necessary was that the Northern Securities Company should receive a majority of the stock of the Great Northern and Northern Pacific Railway Companies and be enabled to vote and collect dividends on the same, and hold the same, thereby controlling the two railways and making certain the pooling of their earnings.

XVI.

The Northern Securities Co. Cannot Compel Us to Accept Great Northern Stock in Lieu of Our Northern Pacific.

The stockholders of a corporation upon dissolution cannot be compelled to accept a distribution of their share of the assets in kind.

Post vs. Beacon, etc. Co. 84 Fed. 369, 375. (C. C. A.)

"The minority has a lawful right to maintain that the contractual relations which it has established with

a corporation whose shareholders they became does not include a contractual relation with any other corporation; and there is no right in law to compel it to elect between such new contractual relation and the loss of its shares in the old corporation, or compensation for them on any arbitrary basis which a reorganization may give. The underlying principle was stated in *Clearwater vs. Meredith*, 1 Wall. 25, 39, and the rule seemed to have been clearly recognized in *Mason vs. Mining Co.*, 133 U. S. 50, 10, Sup. Ct. 224."

Mason vs. Tewabic Mining Co,, 132 U. S., 50, 58.

In this case Justice Miller in discussing the right of the majority stockholders of a corporation to sell all of the assets of the company to a new corporation for stock in that corporation and to distribute this stock among its own stockholders, said:

"They are therefore reduced to the proposition that they must go into this new company, however much they may be convinced that it is not likely to be successful or whatever other objections they may have to becoming members of that corporation, or they must receive for the property which they have in the old company a sum which is fixed by those who are buying them out. The injustice of this needs no comment. If this be established as a principle to govern the winding up of dissolving corporations, it places any unhappy minority, as regards the interest which they have in such corporation, under the absolute control of a majority, who may themselves, as in this case, constitute the new company, and become the purchasers of all the assets of the old company at their own valuation. * * *

We do not see that the rights of the parties in regard to the assets of this corporation differ from those of a partnership on its dissolution, and on that subject,

Lindley on Partnership says, Book 3, c. 10; Sec. 6, sub-div. 4, page 555, original edition.

'In the absence of a special agreement to the contrary, the right of each partner on a dissolution is to have the partnership property converted into money by a sale, even though a sale may not be necessary to the payment of debts. This mode of ascertaining the value of the partnership effects is adopted by courts of equity, unless some other course can be followed consistently with the agreement between the partners, and even where the partners have provided that their shares shall be ascertained in some other way, still, if owing to any circumstance their agreement in this respect cannot be carried out, or if their agreement does not extend to the event which has in fact arisen realization of the property by a sale is the only alternative which a court of equity can adopt."

The authorities cited by Lindley for this proposition amply support it.

XVII.

When May the Circuit Court of Appeals on an Appeal from an interlocutory decree enter a final one?

From what this Court said in *Forsythe vs. Hammond*, 166 U. S. 512, it would seem that where the Judges below were divided as they were in this case, the two who happened to be the majority of the Court of Appeals should not finally decide it when the case is before them merely on appeal from an interlocutory decree.

Judge Kirkpatrick, District Judge (since deceased), granted the preliminary injunction, but without argument.

Judge Bradford, District Judge, sitting as Circuit Judge, after a full hearing and arguments, continued it.

Judge Gray, Circuit Judge, sitting in Court of Appeals, agrees with Judges Bradford and Kirkpatrick, and dissents from the action of the Court of Appeals.

Judges Dallas and Acheson alone concur in the opinion.

Of the five Judges before whom the case came, three thought it should go to final hearing.

Only two thought it should then be finally decided.

You have considered the question in the following cases:

Smith vs. Vulcan Iron Works, 165 U. S. 524.

Mast, Foos & Co. vs. Stover Mfg. Co., 177 U, S. 494.

Britt vs. Peckham Motor Co., 189 U. S. 58.

The *Vulcan Iron Works* was a patent case.

This was followed in 1899 by the case of *Mast, Foos & Co. vs. The Stover Mfg. Co.*, 177 U. S. 494.

The points ruled by this case are:

(1) *Smith vs. Vulcan Iron Works* was decided only after

"*answer and replication filed, a full hearing had upon pleadings and proofs.*"

(2) Circuit Court of Appeals may enter final decrees in a patent case where the temporary injunction is granted in a case where—

(a) The bill be *obviously* devoid of equity upon its face;

(b) And such defect be *incapable* of remedy by amendment:

(c) If the patent *manifestly* fails to show a patentable novelty in the invention:

(d) If there is no doubt of the existence or date of anticipating devices which destroy the patent:

But if—

(a) The showing made by the plaintiff be incomplete; or

(b) *If the case involves a question of fact.*

in either event, (p. 495)

"the parties are entitled to put in their evidence in the manner prescribed by the rules of this court for taking testimony in equity cases."

In other words, before the Court of Appeals can on appeal from an interlocutory decree enter or direct the entering of a final decree, it must be certain and sure that it has before it *all* the facts and *all* the evidence either side can offer to sustain their respective allegations.

If the bill be devoid of equity, it must, this case says, be

"*obviously* devoid."

and so much so that the court can clearly see that the defect is

"*incapable* of remedy by amendment."

If the patent

"*manifestly* fails to show a patentable novelty,"

if there is

"*no doubt* of the existence or date of anticipating devices:"

If there be a question of fact, *presumably* both parties have a right to be heard and introduce all the evidence each desires, and unless the court absolutely knows all such evidence has been introduced, it cannot enter a final decree.

Brill vs. Peckham Motor Co., 189 U. S. 58, was decided in 1902.

There the Circuit Court of Appeals on an appeal from a decree of the Circuit Court granting a preliminary injunction reversed the lower court and directed the dismissal of the bill in equity.

The court below relied upon the decision in *Mast, Foos & Co. vs. Stover Mfg Co.*, just considered, as authorizing such drastic action, but the Supreme Court quoted largely from its own opinion in that case, and among other things said:

> "The *merits of the case were fully before the court*, and the patent in suit related to the use in a windmill of an old and simple mechanical device for the purpose of converting a rotary into a reciprocating motion. It was held that the case fell within the rule *sometimes* applied when there is no dispute upon the facts and there appears to be no reasonable *possibility* that complainant may succeed. But this court took care to define the class of cases in which that might be done, and speaking through Mr. Justice Brown said: * * *."

The court adds that though the hearing below was merely on a preliminary motion, the complainants (p. 62)

> "were subjected on appeal to the same consequences as if the preliminary hearing had been a final one."
>
> "Complainants, if the case had been retained for final hearing, could have *cross examined* defendants' *ex parte* witnesses as to the actual construction of defendants' various trucks * * *
>
> "and could have introduced evidence on these subjects, as also on the question whether complainants' invention antedated the Peckham and Mainer patents. * * *"

One of the defenses was the delay of the inventor in applying for a patent, and the court say:

> "If the matter of delay were of importance as assumed, it was open to the inventor to explain the reason of the delay, if any, and complainants were entitled to make proof of such explanation. * * *
>
> "*If complainants in every case must understand that a motion for a preliminary injunction requires the same showing as the final hearing, very few motions of that sort would be made.*"

The Court concludes its opinion thus:

> "Considering the peculiar attitude in which the case is presented, we prefer not to discuss the question how far the Appellate Courts are justified in reversing orders of the Circuit Court granting preliminary injunctions when their discretion has not been improperly exercised. * * *"

The conclusions from this case would plainly seem to be:

(1) The right of the Circuit Court of Appeals to reverse the lower courts for issuing a preliminary injunction

> "when their discretion has not been improperly exercised"

is left open for further discussion and decision.

(2) The power of the Circuit Court on appeals from preliminary decrees to enter final decrees is limited to cases where

(a) The merits of the case were fully before the court, and there appears no reasonable *possibility* (not probability) that complainants may succeed:

(b) If a question of fact is involved, the complainant is of right entitled to put in his testimony and go to final hearing.

Thus, where delay was alleged, the complainant was entitled to go to final hearing and give what excuses he might to explain such delay.

If defendants used *ex parte* affidavits,*the complainant was entitled to cross examine the party who made them.*

(c) The preliminary hearing and injunction has a well defined, useful purpose, and a complainant is entitled to go into such hearing without being compelled in the Appellate Court to treat it as final hearing with all proofs in. To do so is unfair to the lower court and most unfair to the complainants and gives undue advantage to the defendant.

From all these cases we deduce the following rules:

(1) The right of the Circuit Court of Appeals to reverse the lower courts for issuing a preliminary injunction

"when their discretion has not been improperly exercised"

is left open for further discussion and decision.

(2) The power of the Court of Appeals on appeals from preliminary decrees to enter final decrees is limited to cases where—

(a) The merits of the case were fully before the court, and there appears no reasonable *possibility* (not probability) that complainants may succeed.

(b) If a question of fact is involved, the Complainant is of right entitled to put in his testimony and go to final hearing.

Thus, where delay was alleged, the complainant was entitled to go to final hearing and give what excuses he might to explain such delay.

If defendants used *ex parte* affidavits *the complainant has the right to cross examine the party who made them.*

(c) Unless the case, as stated in the bill, is

"obviously devoid of equity"

and such defect

"be incapable of remedy by amendment"

as where the case stated does not give jurisdiction to the court in which the bill is filed, or where the relief asked is obviously such as the court cannot grant, and it is apparent the defect cannot be cured by amendment:

(d) In patent cases where the validity of the patent is necessarily raised and involved and a decision against its validity is final, the entry of a final decree seems obvious.

(e) The power to enter such final decree is exceptiona and unusual and should be exercised with great caution, and only in cases free from doubt, and where it is plain and certain that there is no

"reasonable *possibility*"

of the complainants' recovering on the whole or any part of their claim.

(f) The practice puts the complainant at a disadvantage. Heretofore in other than patent cases he did not on a motion for a preliminary injunction ordinarily develop his entire proof. This was often impossible and often inexpedient, and sometimes beyond his reach, as when he relied on the books and papers in the hands of the opposite party, or on cross examination of defendants' witnesses.

If he is in the Court of Appeals to go really to final hearing, he is practically denied his preliminary motion which is often absolutely essential to his relief, as where in this case, the subject matter of the litigation will be hopelessly scattered and the complainant practically remediless.

As Chief Justice Fuller said *ante:*

"If complainants in every case must understand that a motion for preliminary injunction requires the same showing as the final hearing, very few motions of that sort would be made."

So far as we have been able to find there is *not a single case holding where the Bill stated a cause* of action and the defendant did not demur, but disputed the averments of fact, that the Court of Appeals may, on an appeal from an interlocutory decree where the motion was for a preliminary injunction, and the hearing was on Bill and *ex parte* affidavits, dispose of the case on the merits and enter practically a final decree.

(1) *The present case was one where the Circuit Court of Appeals on an appeal from an interlocutory order granting a preliminary injunction, could not enter what is practically a final decree, and finally dispose of the case on the merits.*

It is not disputed that the present bill stated a case for equitable relief. This is demonstrated by the fact that the defendant did not demur to the bill, and after the appeal was taken in this case filed an answer to the same.

The motion in the Circuit Court was for a preliminary injunction and was heard on the bill and *ex parte* affidavits. The opinion of Judge Bradford, who granted the preliminary injunction merely stayed the distribution until final hearing.

The action of the Court of Appeals was in effect final.

It will permit, the court admits, the dissipation of the stock in suit by its division among, say twenty-five hundred persons, so that if your petitioners were finally held to be entitled to recover, their victory would be a barren one.

The decision avers on its face that it is, and is intended to be a determination on the merits and a complete adjudication on the essential questions of law and of fact involved in the case. It renders hopeless any further proceedings in the Circuit Court by proofs or arguments to sustain your petitioners' case.

The Circuit Judge held that the case was one which should go to a final hearing, where both of the parties to the controversy would have an opportunity to cross-examine the adversary's witnesses, to compel the attendance of hostile witnesses and the production of all books and papers that may throw light upon the case, and the intelligent consideration by the Court, in disposing of the question of fact, of all the circumstances surrounding the transaction. The right to do these things was denied to your petitioners by the decision of the Circuit Court of Appeals.

That decision disposed of the question of fact, wholly ignoring the circumstances under which the Northern Securities Company acquired the Northern Pacific stock of your petitioners; wholly disregarded the purposes for which all of the railroad stocks were acquired by the Northern Securities Company: wholly disregarded the purposes for which the Northern Securities Company was organized, and the combination against trade and commerce, of which it was the head and front. It did not even mention the fact that the Northern Pacific stock in dispute was assigned to the Securities Company, and is now held by the Securities Company in furtherance and in virtue of the illegal combination and as an indispensable means to perfect an illega scheme. That it was illegally acquired and is illegally held.

It did not even notice that when it held the Securities Company was a real purchaser and became the absolute, law-

ful owner of the stock, it distinctly contradicted the decree which held to the contrary; that when it authorized the present *pro rata* distribution of the stock it was of necessity adopting a scheme diametrically opposed to the return allowed in the decree; and that it was allowing that which this Court in its decree did not allow. Most of these facts were admitted on the hearing for preliminary injunction, but were entirely disregarded by the Court of Appeals in passing upon the question of fact as to the nature of the title the Northern Securities Company acquired to the railroad stocks, though, in our judgment and heretofore in the judgment of this Court, they had a most material and important bearing.

We insist that the Court of Appeals erred in entering what was practically a final decree in this case, because—

(a) There were seriously disputed and substantial questions of fact;

(b) There were seriously disputed and substantial questions of law:

(c) The Northern Securities Company had not demurred to the bill of the petitioners and the hearing in the Circuit Court on the motion for preliminary injunction was on bill and *ex parte* affidavits and before an answer had been filed. And the Court of Appeals found the facts *directly contrary* to the averments of the Bill;

(d) The Circuit Court in issuing the preliminary injunction, did not exceed its discretion, and this the Circuit Court of Appeals admitted in its opinion, though it misunderstood the purpose for which the injunction was issued, saying that the injunction was issued with the understanding that the Circuit Court of Appeals would on a hearing from the interlocutory decree in the case, enter what was practically a final decree in the case,

though of this intention by the Circuit Judge the opinion of the Circuit Court contains no evidence, but, we respectfully submit, points to the contrary,

(e) The Court of Appeals erred in its disposition both of the question of fact and the questions of law in the case; and

(f) The Court of Appeals overlooked material questions of fact which were involved in the case, and the determination of which in favor of your petitioners would have entitled them to equitable relief.

XVIII.

Questions of Fact and of Law.

Among the questions of fact and law insisted upon in the Court of Appeals and which arise on this record, are the following:

Among the questions of facts in the case were these:

(1) Was the Northern Securities Company the lawful owner with the right to sell, of the Northern Pacific stock owned by the Oregon Short Line Railroad Company, or, did it acquire the said Northern Pacific stock in pursuance and in furtherance of the unlawful combination against trade and commerce (and in conflict with the Sherman Law,) by which unlawful combination it was sought to place in the possession of the Northern Securities Company, the agent of the unlawful combination, the control of the Northern Pacific and Great Northern Railroad Companies, and thus restrict trade and commerce, and that *thereafter* the Northern Securities Company held such railroad stocks really only as trustee and custodian?

We alleged that the Northern Securities Company was not such lawful owner.

(2) What were the terms of the contract under which the Northern Securities Company acquired the Northern Pacific stock from the Oregon Short Line? Were they similar to the terms of the contracts under which the Securities Company acquired its other Great Northern and Northern Pacific stock, or did they differ?

Was the Northern Pacific stock assigned by the Oregon Short Line in furtherance of the combination to further which the Securities Company was formed to enable the combination the more certainly to control two parallel and competing railroads engaged in interstate commerce, and with this stock in connection with that of Great Northern *permanently* hold and manage the two railroads in one interest and thus prevent competition between them; and was this to be carried out by a collection of dividends from both roads and a distribution of these dividends among the stockholders of the Northern Securities Company, without regard to who assigned the respective railroad stocks to the Securities Company?

Was a *permanent* holding, and thus control of the two railroad companies by the Securities Company, the

main consideration to petitioners for assignment of its Northern Pacific stock to the Securities Company?

As we show in our petition, the bill alleged that it was, and of this there was no contradiction by the defendants, unless indirectly so by Mr. Hill's affidavit, which affidavit was strangely at variance with Mr. Hill's evidence in the Government Case (Record of that case, page 96) where he testified:

> "I know that the (Harriman) stock was *exchanged* the same as other stock. Now that is all the exact information I had on the subject."

In support of the bill, we add the affidavits of Mr. Harriman, the two affidavits of the bill and extracts from the testimony of Messrs. Hill, Morgan, Clough and others as set forth in our petition.

(3) Is it true, as averred by the appellants, that the original parties forming the combination, (Morgan, Hill & Company) still control the Northern Securities Company and own a majority of its stocks? Did these parties, originally in control of the officers and Board of Directors of the Northern Pacific Railroad Company, inequitably and unlawfully, through that control, threaten the Oregon Short Line to retire the Northern Pacific preferred stock, of which the Oregon Short Line was the owner of a majority, in such manner that the Oregon Short Line would be deprived of the same and be compelled to take par, though it was selling in the market

at a much greater rate, and Morgan, Hill & Company, as the owners of a majority of the common stock of the Northern Pacific Railroad be greatly benefitted by being the sole subscribers to the new common stock which the Northern Pacific under the management of Morgan, Hill & Company, determined to issue at par for the purpose of retiring the preferred stock? And is it true that at the time when the Northern Securities Company was formed by Morgan, Hill and others, and at and before the time when the Oregon Short Line assigned its Northern Pacific stock to the Northern Securities Company that it was induced to do so by the threats of Morgan, Hill & Company to carry out this scheme of retiring the preferred stock of the Northern Pacific, and with the inducement to the Oregon Short Line that by the assignment of its preferred stock in the Northern Pacific and its common stock in the same to the Northern Securities Company, that company would with this stock have a majority and control of not only the Great Northern, but the Northern Pacific, and would permanently hold said stocks and manage and control both roads, and divide indifferently the dividends from the two among the holders of the stock of the Northern Securities Company. (See affidavits of Harriman and extract from Hill, Clough, *et al.*, in our main Brief). Did Morgan, Hill and others unfairly value and too high their Great Northern stock and unfairly value and too low our Northern Pacific stock as a basis of exchange for Northern Securities stock?

If the facts be as stated and as we allege, then Morgan, Hill & Company now in control of the Northern Securities Company and operating in the name of that company cannot, to the disadvantage of the Oregon Short Line, make a present distribution of its Northern Pacific stock in such way that Morgan, Hill & Company will be greatly benefitted at the expense

of the Oregon Short Line and the Oregon Short Line will be compelled to take the Great Northern stock of Morgan, Hill & Company at a high value, and Morgan, Hill & Company will take the Northern Pacific stock of the Oregon Short Line at a low value. And this conclusion follows irrespective of the title which the Northern Securities Company took to said Northern Pacific stock, whether as purchaser or custodian.

On these facts then, at least as against Morgan, Hill & Company and so far as their interest in the same goes, we are entitled to our Northern Pacific stock even if there be, which we deny, other Northern Securities Company stockholders whose equities are superior to ours.

We allege these facts and this result.

(4) Is it true that the railroad stocks originally assigned to the Securities Company are still held by it, and that the certificates of stock of the Northern Securities Company issued for the railroad stocks so assigned can be traced through and into the hands of the assignees, so that a return of the original railroad stocks can be accurately and definitely made?

Petitioners allege that this can be done.

Questions of Law.

(1) As a question of law (likely to frequently arise before this Court in the adjudication as to trusts), what title did the Northern Securities Company take to the Northern Pacific and Great Northern Railroad stocks assigned to it which this Court has held were so assigned in furtherance of a combination against trade and commerce, and contrary to the provisions of the Sherman Act?

Did the Northern Securities Company, though acquiring the stocks in an illegal manner and for an illegal purpose, take a good indefeasible title as purchaser to said stocks as if it acquired them lawfully in the open market?

(2) Did this court, in the case of the *Northern Securities Company against the United States*, 193 U. S. 197, decide that the Northern Securities Company in acquiring the railroad stocks in the Northern Pacific and the Great Northern Railroad, including the stock of the petitioners, only acquired a title as custodian or trustee thereof, and did not become by such acquisition the real, substantial, unconditional owner?

If it did the Circuit Court of Appeals in the majority opinion admits that its present decision is wrong.

(3) Did this court in the said Government suit above cited, tie up in the hands of the Northern Securities Company the railroad stocks of the Northern Pacific and the Great Northern so that the same could not be sold in the market, they being deprived of the right of collecting dividends or voting the same, this Court having decreed that the Securities Co. illegally acquired and illegally held the same, and did this Court then decree one and only one mode of the Northern Securities Company's disposing of that stock, to wit, the return and re-assignment of the same to the persons who originally assigned said stocks to the Northern Securities Company?

If it did, as we allege, then confessedly the decision of the court below must be wrong, for it approves another and wholly different distribution, and based on the Securities Co. being the lawful unconditional owner of said stock.

(4) May the Circuit Court of Appeals on an appeal from an interlocutory decree where the case in the Circuit Court went to hearing on a bill and *ex parte* affidavits, and the defendant did not demur to the bill, and the Circuit Court granted a preliminary injuction, on an appeal from such interlocutory decree, decide as if it was a court of original jurisdiction, disregard the discretion which was admittedly properly exercised by the court below, enter what is practically a final decree in the case, and this when there are disputed questions of fact and of law, part of which questions of fact and of law the Circuit Court does not even mention in its opinion?

(5) Has the doctrine of *in pari delicto* anything to do with the decision of the question involved in this case?

Both in the Circuit Court and the Circuit Court of Appeals it was most elaborately argued that it had, and a brief covering several hundred pages was filed in each court on that question alone. We claim that it has nothing whatever to do with the case, and that that was decided and disposed of in the decree of this court in the Government case.

(6) Have the petitioners, as parties to the litigation in the Government case, a right independent of the action of the Attorney General or of the United States Government to insist upon the finality of the findings and decree in that case on all questions of fact and of law that arise in the case at bar?

We assert that they have.

XIX.

Answer of the Court of Appeals.

Answer to the Questions of Fact.

(1) It answered that the Northern Securities Company was the *bona fide* purchaser and the absolute owner of the Great Northern and Northern Pacific railroad stocks.

In doing so it did not take into consideration or give any weight to the circumstances surrounding the acquisition; the purpose for which the stocks were acquired; the fact that the Northern Securities Company had not a real, independent existence but was merely the representative of the railway stockholders; it overlooked the extracts from the tes-

timony of Messrs. Hill, Clough and others (see our Brief); it relied upon the *ex parte* affidavit of Mr. Hill, but wholly disregarded the fact that Mr. Hill in the Government Case, page 96, of that record testified as follows:

"Q. Mr. Hill, do you know that as a part of the consideration for the sale of the Harriman stock, so called, to J. Pierpont Morgan & Co., a large block of Northern Securities Company's stock, which was to be issued later, was to be turned over to Harriman or his associates?

"A. *I knew that the stock was exchanged the same as other stock. Now, that is all the exact information I had on the subject.*"

It stated results from the testimony of Mr. Harriman which overlooked other portions of his testimony, and disregarded the circumstances under which that testimony was given, and the fair meaning of the words used by him; it made the question of fact turn upon the *words* and not upon the real substantial fact and thus it gave a semblance of purchase where in reality there was no real sale or real purchase; it overlooked and never considered whether it was possible in the transfer of stocks to one of several of the combination to accomplish an illegal purpose, that the agent of the combination acquired a good independent title as purchaser; it never even referred to the opinion of this Court as to the circumstances under which, and the purposes for which, the Northern Securities Company acquired the railroad stocks; because the word *purchaser* was used it relied upon this mere form, and wholly overlooked the substance, as shown by all the surrounding circumstances.

In addition to these, the Northern Securities Company has by its charter the express power *inter alia* to

"hold * * * shares of capital stock created or issued by any other corporation or corporations."

It has not disposed of a single share of the stocks of the two railroad companies acquired by it.

The purposes of the organization of the Securities Company would be utterly defeated by disposing of the railroad stocks or either of them. Hill, Morgan and others testified that the purposes of the Securities Company were: (see *supra* pp. 131 to 145)

"To prevent such raids"

"Absolutely control a majority of the stock of the Northern Pacific"

"Making their holding together permanent"

"Making permanent the general policy"

"To keep the stock of the Northern Pacific safe beyond question"

"Combining their interests in the property"

"Unifying the interests in each road," etc.

It was solely and only by holding the railway stocks that these purposes could be accomplished.

All these things the Circuit Court of Appeals entirely overlooked as unimportant.

(2) The only answer to the second proposition was the finding of an unqualified contract of sale, and the statement in the opinion as follows:

"Undoubtedly, it was anticipated by the complainants, as well as by all concerned, that the rights ordin-

arily incident to the ownership of stock, including the right to vote and to receive dividends, would be exercisable as to this stock by the Securities Company. An expectation is not a contract; and therefore the frustration of this anticipation cannot be said to have occasioned a failure of consideration."

This was a strange misapprehension of our position as to permanent holding.

The Court reached this conclusion by overlooking the positive averments of our bill, sworn to, and which were not contradicted unless indirectly by Mr. Hill's affidavit, and also overlooked the proofs we submitted in support of the averments as to permanent holdings. to-wit: the affidavit of Mr. Harriman and extracts from the testimony of Messrs. Hill, Morgan, Clough and others, as set forth in our Brief.

(3) This question of fact the Court never even noticed in its opinion. It was a material one upon which we were entitled to relief even if the Securities Co. was a purchaser.

(4) This question of fact was not noticed in the opinion, though it is agreed that it was a subsidiary question and not necessary to be noticed in the manner in which the Court below decided the case.

Answer to Questions of Law.

(1) The Court did not discuss or consider or seem to think that this question was raised in the case. It decided the case as if the Northern Securities Company had been organized for a lawful purpose, acquired the stock for a lawful purpose, and there never had been an unlawful combination of which it was the trustee and a member.

(2) It held that this Court had not even

"incidentally"

considered the question.

(3) It held that the portion of your decree referring to the return by the Northern Securities Company to the original assignors of the railroad stocks assigned was permissive only and was entirely consistent with another mode of distribution, which other mode was a denial of the facts on which this Court reached the conclusion and made the decree that it did, and in direct contradiction of your decree that the Securities Company had illegally acquired and illegally held such stock.

(4) It answered this point in the affirmative.

(5) It did not consider it necessary to pass upon this question.

(6) It did not consider this question, though it probably assumes in the opinion that your petitioners had the right to set up the opinion and decree of this court *if* you had passed upon the same.

XX.

Oversight of Court of Appeals.

The necessity for a hearing in the ordinary way where each side could put in all its proofs, cross-examine witnesses, compel the attendance of hostile witnesses and the production of all books and papers, is not only apparent from the complications in this case, but is further shown by the inaccuracy which the Circuit Court of Appeals fell into in finally considering and passing on the case merely on an interlocutory hearing and upon *ex parte* affidavits.

Thus the Court of Appeals held,

> "The resolution which authorized the acquisition of the railway stock on behalf of the Securities Company was adopted by its Board of Directors at a meeting *at which Mr. Harriman was present* as a member of the Board, and the only authority conferred was 'to purchase said stock * * * at an aggregate price of $91,407,500 payable as to $82,491,871 thereof in the full paid and non-asessable shares of the capital stock of this Company at par, and as to $8,915,629 in cash.' It is obvious that this resolution contemplated a 'purchase' and not a bailment or trust".

The Court fell into error. Mr. Harriman was not present at the meeting of November 15, 1901, when this resotion was passed, as will be apparent by an examination of a

certified copy of it on page 382 of the record. Mr. Harriman was present at the meeting of the Board of Directors on November 19,1901, when it is said the minutes of November 15th were read and adopted, but what, if any, action was taken by him at the time is not stated.

The Court said that the circumstances following the resolution demonstrated the transaction to be a purchase, and then added this:

> "The cash so paid, which amounted to about $7,522,000, was (as is stated in the bill) used for the purchase of other property and for corporate purposes."

The Court here again fell into error. Paragraph VI. which was referred to, page 4, relates to the receipt of money by the Northern Securities Company and not by the Oregon Short Line Railroad Company:

An entire, indeed with due respect, a grotesque misapprehension of our position.

A careful analysis of the opinion of Judge Dallas will show repeated proofs that he did not grasp our views of the case, and felt it his duty to wholly eliminate from his consideration all views of what you had said or decreed in this Goverment case; to wholly overlook the combination which was illegal, and that organized and used the Securities Company merely as its tool, and assigned the stock solely to carry out and perfect the illegality, and to regard the subject matter of the suit as an ordinary contract of purchase by a lawful corporation for a lawful purpose, of personal property.

When we urged that even if (which we denied) the Securities Company had purchased and acquired title to the

railroad stocks, yet all the circumstances of the case irresistibly demonstrated that it was *permanently* to hold the same and thus manage the two railroads—that this was the real *consideration* for the arrangements—that it was incredible that any one would have assigned his railroad stocks to the Securities Company and take merely the stock of the Securities Company in payment, for the Securities Company had no property (except $30,000 spent for organization) and its stock had no value except that which the assigned railroad stock gave it,—that while it is true in connection with our preferred stock we did receive $8,915,629 cash, yet, 9-10 of our consideration, $82,491,871, was in the Securities Company stock.

The only answer we receive is that it was *anticipated* that the Securities Company should have the right to vote and receive dividends on the stock, but *expectation* is not *contract*.

XXI.

The Court of Appeals misapprehended the opinion and decree of the Circuit Court (Judge Bradford) in that the Court of Appeals determined that Judge Bradford did not grant a preliminary injunction to hold the STATUS QUO until all the testimony and proofs could be put in and a final hearing could be had, but granted it ONLY UNTIL the Circuit Court of Appeals on an appeal from an interlocutory decree granting the preliminary injunction, could finally pass upon and determine the case.

In the opinion Judge Dallas said:

"It appears from the opinion of the learned Judge of the court below that in granting this injunction he

was *materially influenced* by the consideration that the questions involved were, as he viewed them, serious and doubtful, and that a decision by him denying the injunction would, if made, not be reviewable upon appeal. We think that upon this ground he was justified in requiring that the *status quo* should be preserved and the subject matter of the controversy be withheld from dissipation until the judgment of this court could be obtained. But now the substantial rights of the parties only need be considered, and whether the injunction should stand or be dissolved ought, in our judgment, be determined upon the merits and without further delay. *Western Union Telegraph Co. vs. Pennsylvania Railroad Company*, 123 Fed. Rep. 33, 36. There have been cases, it is true, in which it has been held that where the court in the first instance has unreservedly exercised its discretion in granting or refusing a preliminary injunction, its action ought not to be interfered with by an appellate court 'unless there is some strong reason for it.' *Massey vs. Buck*, 128 Fed. Rep. 27.

"But to the circumstances of this case those rulings are inapposite.

"Attentive reading of the opinion of the learned Judge of the Circuit Court has satisfied us that he regarded the fact that an appeal would not lie upon the denial of the injunction as 'of controlling importance,' and that his decision was made with the understanding that the defendant below would be entitled to invoke a complete adjudication of the entire controversy by this court. * * * "

If this opinion of the Court is correct, why Judge Bradford filed the elaborate opinion he did—why he considered

the facts and the questions of law and went so fully into the authorities is inexplicable.

An examination of Judge Bradford's opinion we now propose to make, and thus show the misapprehension of the same given in the majority opinion of the Circuit Court of Appeals.

The opinion of Judge Bradford begins at page 395 of the record and extends to page 423, and how it is possible to say that Judge Bradford granted the preliminary injunction,

> "with the understanding that the defendant below would be entitled to invoke a complete adjudication of the entire controversy in this Court"

and that he was wholly controlled in the granting of the injunction by the fact that an appeal could not be taken by the complainants in the bill if the injunction was refused, is certainly not found in *words* in the opinion of Judge Bradford. On the contrary, that opinion seems undoubtedly to have been based upon the fact that Judge Bradford believed there were serious and doubtful questions in dispute, both of law and of fact, and that it was his duty as a chancellor to hold the *status quo* until the case could be disposed of on final hearing.

Among other things, Judge Bradford says, after a full recital of the averments of the bill, as follows:

> "The defense controverts material allegations in the bill, some of which embody averment of facts and others averments of law. With respect to some of the alleged facts, important in their bearing upon the equities of the case, the affidavits and exhibits are conflicting on substantial points. On the face of the Bill it is evident that the final decision necessarily will involve the consideration of grave, novel and delicate questions of law. On the presentation of their arguments for and

against the awarding of a preliminary injunction, counsel on both sides have, with strong insistence, urged, and with elaboration and signal ability, discussed a number of legal propositions, important and far-reaching in their scope and by no means free from doubt. Whether or not a final decision will require a determination of all these propositions, the fact remains that the eminent counsel advancing them have, during a hearing of nearly *three days*, pressed them with a zeal and with manifest reliance upon their soundness and materiality."

Again discussing the question of the convenience and inconvenience and the cases where injunction should be issued, the court said, p. 414:

"But this court has power to require of the complainants as a condition precedent to the issue of the injunction, a bond in such form and amount as fully to indemnify all persons who may ultimately be found entitled to such dividends against all loss or damage resulting from the suspension of their payment. On the other hand the denial of a preliminary injunction would, if the complainants should ultimately prevail, render barren their victory so far as relief in this suit is concerned.

"A *pro rata* distribution under the proposed plan of the $39,661,450.00 par value of the stock of the latter company (Northern Pacific), included in the amount now sued for, among all stockholders of the Northern Securities Company, other than the complainants, would not only debar the latter from any relief to which they may be entitled under their present bill, but to a moral certainty, entail upon them a burdensome multiplicity of suits attended with great labor and expense. It would also obviously be calculated to hinder and embarrass, and probably or possibly defeat them in their effort to recover large quantities of such stock from per-

sons purchasing the stock in good faith and for full consideration, directly or indirectly, from the stockholders of the Northern Securities Company participating in such *pro rata* distribution through the creation of new equities on the part of such purchasers.

"In view of the character of the questions involved in this case it would be highly inequitable that the complainants should, in advance of any final decision on the merits, be put in such a position as to be precluded, either wholly, or in a large measure, from the realization and enjoyment of the fruits which should be theirs through the immediate result of a final decree in the present case should it ultimately be determined in their favor. * * *"

Judge Bradford, now referring to a number of questions in the case, said:

"It is manifestly improper that these matters should be decided on the fragmentary and inconclusive evidence now before the Court. *They require deliberate investigation in the accustomed mode on evidence taken in due course and in the light of an examination of books and papers produced before a master.*"

* * * *

"The case falls well within the established rule that a preliminary injunction maintaining the *status quo* may properly issue whenever the questions of law or of fact ultimately determined are grave and difficult and injury to the moving party will be immediate, certain and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small if it is granted."

Judge Bradford so far has not even mentioned the question that the complainants could not appeal if an injunction were refused—has not even mentioned it, much less relied upon it.

So far the case has been put that it was the duty of the Judge to grant the injunction because there were grave and doubtful questions of fact and of law, and it was a case where in the accustomed mode, evidence should be taken before a master.

Just at the end of his opinion Judge Bradford did add this:

> "An appeal does not lie from an interlocutory decree of this court denying a preliminary injunction. *While this consideration is entitled to no weight* where, on the application for an injunction, if it clearly appears that the complainant cannot prevail on the final hearing, it is often of controlling importance where on such application there is room for reasonable doubt as to the ultimate result. Under the circumstances, this court would not be justified in refusing the injunction sought. Such refusal would not be an exercise of sound, judicial discretion. It would not only be improvident in the extreme, but betray peculiar insensibility to the fallibility of human judgment so often accentuated by differences of opinion in even the highest judicial tribunals."

To say that Judge Bradford merely granted this preliminary injunction

> "with the understanding that"

it tied up the case until the Circuit Court of Appeals on an appeal from his decree would render practically a final judgment, is, we submit, not proven. It overlooks the extracts we have cited; it is inconsistent with his own lan-

guage; it is not justified by the opinion, and with great respect it is said it is on a par with the declaration of the Court of Appeals that the decision of the Supreme Court of the United States in the Government case, 193 U. S. 197, did not even "incidentally" consider the question involved in the present controversy, *i. e.*, the title of the Northern Securities Company to the stocks of the Northern Pacific Railway Company.